

No. 11097

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

UNITED STATES OF AMERICA,  
Appellant,  
vs.

WALTER LUBINSKI,  
Appellee.

---

WALTER LUBINSKI,  
Appellant,  
vs.

ALASKA STEAMSHIP CO., a Corporation,  
Appellee.

---

Apostles on Appeal

In Two Volumes

VOLUME II

Pages 271 to 531

---

Upon Appeals from the District Court of the United States  
for the Western District of Washington  
Northern Division

FILED

OCT 16 1945



No. 11097

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

UNITED STATES OF AMERICA,  
Appellant,

vs.

WALTER LUBINSKI,  
Appellee.

---

WALTER LUBINSKI,  
Appellant,

vs.

ALASKA STEAMSHIP CO., a Corporation,  
Appellee.

---

Apostles on Appeal

In Two Volumes

VOLUME II

Pages 271 to 531

---

Upon Appeals from the District Court of the United States  
for the Western District of Washington,  
Northern Division

---





JOHN KRISTIENSEN,

called as a witness on behalf of Respondents, having been duly sworn by the Notary Public, testified on behalf of Respondents by deposition as follows:

Direct Examination

By Mr. Franklin:

Q. Would you state your name, please?

A. John Kristiensen.

Q. Where do you live, Mr. Kristiensen?

A. 1505 West 60th, Seattle, Washington.

Q. By whom are you employed at the present time? A. Alaska Steamship Company.

Q. In what capacity? A. Chief mate.

Q. On what vessel?

A. The John W. Cullen.

Q. Are you presently planning to leave Seattle to be gone for an indefinite period of time on the Cullen? A. Yes, sir.

Q. You do not know whether you will be back in Seattle when this case may be tried?

A. I do not know when I will be back, because we are making shuttling trips, and so on. The Army has the ships and you can never tell.

Q. Mr. Kristiensen, how long have you followed the sea? A. Thirty-seven years.

Q. You have followed it all of your life?

A. Yes.

Q. Has your sea service included all oceans and all coasts? A. Yes, sir. [227]

Q. How long have you been a mate?

A. Three years.

(Deposition of John Kristiensen.)

Q. How long have you been in the employ of the Alaska Steamship Company, approximately?

A. Since December, 1942.

Q. Who were you employed by before that?

A. Griffiths Steamship Company.

Q. Mr. Kristiensen, where were you employed in June, 1943?

A. Alaska Steamship Company.

Q. On what vessel? A. On the Flavel.

Q. In what capacity? A. Chief mate.

Q. Was the Flavel a new or old ship?

A. Well, it was practically a new ship.

Q. What type of ship?

A. A Liberty ship.

Q. What was she designed for in June of 1943?

A. Carrying troops. Of course they call it a combination freight and troop ship.

Q. Mr. Kristiensen, during the month of June, 1943, the latter part of the month, where was the Flavel? I will put it this way: was the Flavel in San Francisco during the latter part of June, 1943? A. Yes, that is right.

Q. What was the vessel doing there at that time?

A. She was loading cargo and troops for Alaska.

Q. Who had charge of the loading of the cargo on the vessel in San Francisco?

A. Lieutenant Hill. [228]

Q. What agency or branch of the service?

A. The Army.

Q. Did you as mate have anything to do with

(Deposition of John Kristiensen.)

the loading of the freight at San Francisco?

A. No, sir.

Q. Who was Lieutenant Hill?

A. He was kind of supercargo, I would call it.

Q. Was he in the Army?

A. Yes. He was a lieutenant in the Army.

Q. Did he remain with the ship after you loaded in San Francisco?

A. Yes, sir; he stayed right with it.

Q. Were you consulted in any way as to where the cargo should be stowed in San Francisco?

A. No, sir; I was not. I had nothing to do with the cargo.

Q. What did the cargo consist of, mainly?

A. Mostly explosives, ammunition.

Q. Do you recall what was loaded in San Francisco, in No. 3 hatch?

A. There was Jeeps and ammunition—"snow-birds", as they call them, or something like that. I think it was "snow-birds" they called them.

Q. Under whose supervision was that loaded?

A. It was loaded in San Francisco.

Q. But under whose supervision was No. 3 hatch loaded with the Jeeps and other equipment? Who had charge of loading No. 3?

A. You mean in San Francisco?

Q. Yes. A. The Army. [229]

Q. Did you have anything to do with it?

A. No, sir.

Q. Mr. Kristiensen, what troops did you carry aboard the vessel when you left San Francisco?

(Deposition of John Kristiensen.)

I mean what type of troops were they, the different branches?

A. Well, we also had a working detail.

Q. Were they soldiers or sailors or what?

A. Soldiers.

Q. Approximately how many soldiers?

A. Well, they had over eleven hundred, I know, but I really don't know how many there were.

Q. Did you have any Naval units aboard?

A. We had the amphibious crew and the armed guards.

Q. What was the duty of the armed guards?

A. They were there in case of air raid or submarines, or anything like that.

Q. They were permanently attached to the ship, were they?

A. Yes, they were permanently attached to the ship.

Q. Approximately how many amphibious troops did you have?

A. Well, about around fifteen or sixteen, I guess.

Q. Fifteen or sixteen?

A. Somewhere along there.

Q. Who were they in command of?

A. I don't really remember his name. Have you got his name?

Q. No; but was he a Naval officer?

A. A Naval officer, yes; an ensign, but I don't remember his name now.

(Deposition of John Kristiensen.)

Q. What is the function of amphibious troops on a troop ship; what do they do? [230]

A. They take the landing barges or take the stuff ashore; take the soldiers ashore for landing, and ammunition and all the stuff, you know.

Q. What equipment did the amphibious troops have at the time they left San Francisco; what equipment did they have aboard?

A. They had the landing barges to take care of.

Q. Where were they stowed?

A. Stowed on deck.

Q. Forward?

A. Both forward and aft; principally No. 4 and No. 2.

Q. Was there any other equipment belonging to the amphibious troops, to the barges, that was stowed on the forward portion of the vessel?

A. Yes. There was their equipment for landing barges there on the deck.

Q. What did that equipment consist of, generally?

A. Oh, there was tanks and bombs, smoke bombs, and rations.

Q. Where had those been loaded, and by whom?

A. That had been taken aboard in San Francisco by the Army.

Q. What was the number of smoke bombs loaded, approximately?

A. There was one for each barge, and we had eight barges.

(Deposition of John Kristiensen.)

Q. So there were eight of those distress smoke bombs? A. Yes.

Q. Would you describe how they were packaged, or what they came in?

A. They came in some carton, paper carton.

Mr. Levinson: You saw those on deck there?

A. Oh, yes.

Q. Did you ever see one of those bombs after the carton [231] was removed from it?

A. Yes; I saw them.

Q. Would you describe what the container of the bomb looked like after the carton was removed?

A. It is round. About that long (illustrating).

Q. "That long" means about what?

A. I don't know—

Q. Was it like a gallon can?

A. Yes. I would say about four inches, I guess, something like that, in diameter. Four or five inches or something like that in diameter. That is approximate.

Q. How long would you say it was?

A. Oh, about a foot or so.

Q. Was it a tin container? A. Yes.

Q. How was it stoppered or topped?

A. There is a screw to unscrew there. It is kind of a cap to unscrew.

Q. Mr. Kristiensen, what did you do with reference to stowing those smoke bombs off the deck?

A. They were lying in the water on the deck there, in the rain, and they were put 'way down in the forepeak.



(Deposition of John Kristiensen.)

Q. When did you do that, when you were in San Francisco or after?

Mr. Levinson: Do not lead the witness.

A. No; we did that up in Alaska.

Q. Was any other equipment besides the smoke bombs placed in the forepeak?

A. Yes. There was some of the rations, and malted milk, and stuff like that that was mixed in with it. [232]

Q. Do you know where the distress bombs were stowed in the forepeak? A. Yes.

Q. Where were they stowed?

A. They were on the starboard side in the forepeak.

Q. Would you describe what the forepeak on the Flavel was like from the time you would go down the ladder or manhole? Would you tell us just what it was shaped like? What was in the gear locker, first?

A. Well, you first walked down a wooden ladder, and there are some stanchions in the front there you have to walk around. While you are going down you have to walk on this side here, that is where the stuff was lying. On the other side the amphibious crew had the guns and stuff they were working on.

Q. We will come to that later. When you first descend into the forepeak what is the first locker you come to?

(Deposition of John Kristiensen.)

the forepeak after the cargo was stowed down there, before the fire?

A. I don't know that. I was up and down there lots of times.

Q. Who had charge of the cleaning up of the forepeak?

A. Well, that is what the sailors was doing.

Q. What particular individual?

A. The boatswain.

Q. Who had a key to the forepeak?

A. The boatswain.

Q. After you reached Alaska was anybody working in the forepeak other than members of the crew?

A. Yes; the amphibious crew.

Q. What were they doing?

A. They were putting the guns together, cleaning the guns.

Q. Where did the guns come from?

A. They came from—— [235]

Q. I mean were they guns on the landing barges?

A. They were guns for the landing barges, yes. They was boxed up, you know, and came aboard mixed in with the rest of the stuff that they picked out. Instead of being on deck I let them go down there and do it because it was dry down there, and wet and miserable on deck.

Q. Did anybody ask your permission to use the forepeak for that purpose?

A. Well, the amphibious crew ensign.

Q. Did you give it to him?

A. Yes.

Q. Approximately how long before did they be-



(Deposition of John Kristiensen.)

gin working before you had this smoke signal discharge up at Attu?

A. I don't know how many days but they were down there many days before that happened. They were down there quite a while.

Q. Were they working regular hours?

A. Well, no, they was not working any regular hours. They worked practically night and day, those fellows.

Q. Mr. Kristiensen, did Mr. Lubinski ever make any complaints to you after the amphibious crew began using the forepeak? A. Yes.

Q. What did he complain about?

A. He complained that they made too much mess down there.

Q. Whose duty was it to keep the forepeak clean and shipshape?

A. Well, really it should be his duty.

Q. Whose duty?

A. Well, the boatswain. He should have his gang to do it. [236]

Q. Who was the boatswain on this trip?

A. Lubinski.

Q. Mr. Kristiensen, were you on watch at the time the smoke distress bomb discharged at Attu?

A. No.

Q. What time of night did it occur?

A. Around ten o'clock, near ten o'clock.

Q. Where were you at that time?

A. I was in my room.

Q. When had you gone off watch?

(Deposition of John Kristiensen.)

A. Eight o'clock I go off watch.

Q. How was your attention directed to that event?

A. They told me there was a fire in the forepeak.

Q. Who told you?

A. I don't remember. It was the third or second mate, either one of them.

Q. What did you do?

A. I went out and got up there and put the fire hose on it.

Q. I beg your pardon.

A. I went up there and we got the fire hose on it.

Q. What did you see when you got up in the vicinity of the forepeak?      A. I saw smoke.

Q. Where was it coming from?

A. Coming out of the forepeak.

Q. Were any of the merchant crew there at the time?      A. Yes.

Q. Who was there? Let me simplify it; was Mr. Lubinski, the boatswain, there?

A. He was there. [237]

Q. What orders, if any, did you give Lubinski about going into the forepeak and fighting the fire?

A. I didn't give him any orders. He volunteered to go down there.

Q. Do you know what equipment he used before he went down there?

A. Yes. He put the mask on, the gas mask on.

Q. Do you know whose gas mask it was?

(Deposition of John Kristiensen.)

A. Yes. I think it was mine.

Q. Mr. Kristiensen, who issued you that gas mask?  
A. The Army.

Q. When?

A. In San Francisco. I think I got it from Hill, the lieutenant there. They dished them out. All the crew got one, everybody.

Q. Was Lieutenant Hill with you at Attu?

A. Yes.

Q. He made the entire trip with you?

A. Yes; right down until we got back here. He went even down to Honolulu with us.

Q. Did you have other gas masks available besides the ones issued by Hill?

A. Yes. We had the gas masks that belonged to the ship, but that was only one or two of them.

Q. Would you describe your gas mask, just roughly, what it looked like?

A. It was one of those long ones that screw on in the front.

Q. What is it made of?

A. It was some kind of canvas. It was rubber and— [238] it was rubber.

Q. How did it fit, over the head?

A. They fit me fine and dandy.

Q. What was used about the eyes in the composition of the mask?

A. Kind of goggles, like, and glasses.

Q. Was your gas mask that Mr. Lubinski borrowed defective or in good condition?

(Deposition of John Kristiensen.)

Mr. Levinson: He doesn't know. He never used it.

Mr. Franklin: He will testify about that.

Mr. Levinson: Afterwards.

Mr. Franklin: He went down at the same time.

Q. Was it in good condition? A. Yes.

Q. How long did Mr. Lubinski stay down there, according to your recollection?

A. Oh, about five minutes.

Q. And then what happened?

A. He came up and said he couldn't see nothing.

Q. Then what did you do?

A. I was down there for about a couple of minutes and I couldn't see nothing.

Q. What gas mask did you use?

A. The same one.

Q. How long were you down there?

A. About a couple of minutes was all I was down.

Q. Then after you came up did Mr. Lubinski borrow your mask again? A. Seather.

Q. The third officer? [239]

A. No; the second officer.

Q. Did Lubinski go down again to your knowledge, after the first time?

A. I am not sure of that.

Q. Did you remain on deck until the bomb was discovered? A. Yes.

Q. Did you see the bomb after it was discovered? A. Yes.

(Deposition of John Kristiensen.)

Q. Where was the bomb when you saw it?

A. It was up on deck.

Q. Just describe the appearance of the container and the tin?

Mr. Levinson: Who brought it up, do you know?

Q. Do you know who brought it up?

A. No, I do not. I don't remember who brought it up. I found it behind the ladder.

Q. Describe what it looked like when the bomb was brought to the deck.

A. It was burned, and a hole in it.

Q. Where was the stopper or plug?

A. I don't know. It was all burned up.

Q. Was it on the distress bomb—

Mr. Levinson: Do not lead the witness. He just told you he didn't know where it was. He said it was all burned up.

Q. Was there any evidence of the stopper still in the bomb when you examined it on deck?

Mr. Levinson: That is still leading, and I object to the question.

Mr. Long: Do you insist upon the objection?

Mr. Levinson: No.

Q. Would you answer the question?

A. I don't know, because all I saw was that there was a hole in it. It burned up and melted.

Q. Mr. Kristiensen, do you know of your own knowledge who was in or using the forepeak just before the alarm was sounded?

A. The amphibious crew was down there.

Mr. Levinson: Just a moment. The question was

(Deposition of John Kristiensen.)

do you know of your own knowledge. The witness was in his room at the time, I understand.

Mr. Franklin: We will find out.

Q. (By Mr. Franklin): Do you know of your own knowledge? The rest of the men, I understand, had been down there.

A. I don't know of anybody else that had been down there.

Mr. Levinson: You cannot tell that.

Q. Did you make an investigation of this occurrence after it happened?

A. Well, I understand——

Mr. Levinson: You cannot tell what you understand.

A. Other than that I don't know.

Q. Mr. Kristiensen, at ten o'clock, or at the time this bomb escaped from its container, were any of the hatches working?

Mr. Levinson: That is assuming that it did. You do not know.

Mr. Franklin: Certainly; that is what obviously happened.

Mr. Levinson: I object to the form of the question, asking him if at ten o'clock any of the hatches were [241] working, and then putting in preliminaries.

Q. Do not pay any attention to counsel, Mr. Kristiensen, because he makes his objection and it goes in the record. That is without any disrespect to my colleague here. You just answer my question. I will ask that the question be read.



Deposition of John Kristiensen.)

(Last question read.)

Mr. Levinson: In order to be perfectly fair to the witness and fair to both sides, why don't you ask him what happened at the time, without describing what you think may have happened at ten o'clock?

A. I don't know if they were working or not.

Mr. Franklin: That answers everything.

Mr. Levinson: Except it does not answer my objection to the form of the question.

Q. Mr. Kristiensen, how long were you present in the forepeak from the time the gas first escaped until you returned to your quarters?

Mr. Levinson: I think that is an ambiguous question. I do not understand it myself. He was notified after the fire started.

Mr. Franklin: And I want to know how long he was at the forepeak until he returned.

Mr. Levinson: That is not what you asked. You asked him how long after it started.

A. I don't know. I can't tell. It took about twenty minutes or half an hour. That I am not so sure of, but I think I had it down in the notebook.

Q. Mr. Kristiensen, how long were you exposed to the fumes and the smoke in the forepeak when you were down there?

A. How long I was exposed? [242]

Q. Yes.

A. I said I was down there two minutes, that's all. I didn't care to stay down there any more. It was a terrible smell to it.

(Deposition of John Kristiensen.)

Q. Did you suffer any irritation or pain in your eyes from that exposure?

A. No, sir. It didn't affect my eyes or anything.

Mr. Levinson: It didn't what?

A. It didn't affect my eyes or anything, but—

Mr. Levinson: But what? You started to say something else.

Mr. Franklin: He didn't say anything.

Mr. Levinson: Did you, Mr. Kristiensen? Did you start to make some explanation?

A. The smell, that is all.

Q. What effect did the smell have on you?

A. Well, like I wanted to throw up, or something.

Q. It made you sick?

A. It made me sick. I couldn't stand the smell.

Q. Did any of the other men who went below to assist in locating the escaping smoke bomb make any complaint to you, as mate, that their eyes were irritated from exposure to the smoke?

A. No.

Mr. Levinson: Was there any other man besides Sather?      A. No.

Mr. Franklin: The answer is "no."

Mr. Levinson: Just a minute. Was there any other man besides Sather? [243]

Q. How many men were down there, to your knowledge, in number, attending to locating or putting out the fire in the forepeak?

A. Sather and Gil.

Q. That is Gil Erickson?



Deposition of John Kristiensen.)

A. Yes. And then there was this Navy gunnery officer was down there. He also was down there.

Q. Anybody else besides Lubinski and Erickson?

A. Well, I don't know. There must have been some more, I guess.

Q. Did any of those men, including Lubinski, make any complaint to you immediately after the accident that their eyes had been affected and irritated by exposure to the fumes? A. No.

Q. Mr. Kristiensen, what time did you reach Iska on the morning of August 15, 1943?

A. It was around six o'clock in the morning when we dropped anchor.

Q. Were you on watch at that time?

A. Yes.

Q. Do you remember anything happening about 0.30 hold that morning? A. Yes.

Q. What occurred there, unusual?

A. Well, one Jeep took fire.

Mr. Levinson: Just a minute; I object unless he was down there.

Mr. Franklin: He was there.

Mr. Levinson: Did you see the fire start? [244]

Mr. Franklin: Never mind——

Mr. Levinson: Wait a minute——

Mr. Franklin: Do not answer anything until I get through with this. Will you make your objection, Mr. Levinson?

Mr. Levinson: My objection is that he is speaking obviously from hearsay. If this man was there the proper way is to ask him if he was there when

(Deposition of John Kristiensen.)

the fire started, and if he was there then he can tell what he observed. If he came afterwards, or was called there, he cannot tell how it started, except what somebody told him.

Q. Did you fight the fire yourself?

A. Yes, sir.

Q. Did you see what was burning?

A. No, I didn't see what was burning until after the fire was out.

Q. After the fire was out did you see what was burning?

A. Then I saw what was burning, yes.

Q. What was burning?

A. A Jeep, and all the belongings, all the clothes. They called it a "snow-bird."

Q. It operates on snow, doesn't it?

A. Yes.

Q. During the morning preceding the fire what was being done on board the ship at Kiska?

A. Discharging.

Q. Discharging what?

A. Well, Jeeps, or "Snow-birds," and all different stuff.

Q. When did the soldiers leave? [245]

A. They started around nine o'clock, or nine or ten o'clock, around there.

Q. How did they get ashore?

A. On landing barges.

Q. Who ordered or gave instructions as to which cargo was to be removed?

A. The Army.

Q. Who in particular?

Deposition of John Kristiensen.)

A. Lieutenant Hill.

Q. What did you have to do with ordering or having any control over what cargo was removed?

A. I didn't have any real control of it, unloading any cargo.

Q. What individuals were discharging the catches? A. The soldiers.

Q. Were any of the merchant marine crew used for that purpose on the morning of the Kiska invasion? A. No, sir.

Q. Who called your attention to the fire?

A. The second mate, I believe it was.

Q. What did you do?

A. I went and got the fire hose out.

Q. When you came to No. 3 hatch what did it look like?

A. I couldn't see nothing but smoke.

Q. Then what did you do?

A. I got the fire hoses out and put water in them.

Q. Where did you go?

A. I went down in the 'tween deck myself, with the boatswain.

Q. What did you use to go down? Did you have any mask? A. Yes; I had a mask on. [246]

Q. How long did you remain in that 'tween decks?

A. I was down there for about fifteen minutes, somewhere around there.

Q. How long before the fire was put out?

A. About half an hour.

(Deposition of John Kristiensen.)

Q. Where was the fire burning, from what you could see?

A. I couldn't see where it was burning at that time because there was too much smoke. There was no fire, but just smoke.

Q. What did you do about putting out the fire, personally?      A. Put water on it.

Q. What happened after that with reference to the smoke?

A. What happened after the smoke?

Q. No. Did you succeed in getting the smoke out?

A. Well, yes, after we got underneath with the hose and they hit what was burning there. It kind of calmed down and we could see a little bit, and then we went down in the lower hold.

Q. Were you wearing your mask all the time?

A. Yes.

Q. When you got down in the lower hold what did you find?

A. I found that "snow-bird" was the one that was burnt—had burned up. All the clothes was burned up.

Q. Describe what clothes were burned in it.

A. A rug bag and cushion.

Mr. Levinson: A sleeping bag?

A. No. The box they have their clothes in, that they pack in on their shoulders.

Q. Barracks bags?      A. Yes. [247]

Mr. Levinson: Knapsacks?

Mr. Franklin: No; they are barracks bags.

Deposition of John Kristiensen.)

Q. Blue denim?

A. No; the canvas bags that they pack.

Q. How much of the Jeep was burned?

A. Well, most everything was burned that could be burned, except the steel.

Q. How long were you down in the lower hold before you were able to get down there?

A. About five minutes. I wasn't down there very long because then everything was under control, so I went up again. But Benz and Erickson was down there.

Q. Who did you see, or what AB's did you see down in the hold fighting the fire?

Mr. Levinson: The lower hold or the 'tween-decks?

Mr. Franklin: Either the lower hold or the 'tween-decks. A. In the lower hold, Benz.

Q. He was an AB? A. Yes.

Q. Did you see the boatswain, Lubinski, down there?

A. I can't remember if I saw him. I wouldn't say he was not down there, and at the same time I don't know anything about it. But I cannot recollect him.

Q. Do you know the cause of the fire?

A. Well, as I was told——

Q. Never mind. You do not know of your own knowledge? A. I was told——

Mr. Levinson: You cannot tell that.

A. It was started in the Jeep down there. [248]

(Deposition of John Kristiensen.)

Mr. Franklin: We will prove that by other testimony.

Q. (By Mr. Franklin): Mr. Kristiensen, did you wear your Army mask at the Kiska fire, or your ship's mask?

A. The one I was given out by the Army.

Q. Did you suffer any irritation in your eyes from the smoke?      A. No, sir.

Q. Did Mr. Benz or Mr. Erickson or Mr. Sather wear masks when they were down in the hold fighting the fire?      A. Yes.

Mr. Levinson: So far he said Benz was down there.

Q. What officers were down there?

A. Erickson was there.

Q. What officers were in the hold, in addition to the seaman Benz, fighting the fire—anybody else?

A. I don't know, but I remember Erickson was there.

Q. Did either Mr. Erickson or Mr. Benz complain to you about suffering from smoke irritating their eyes?

A. They made no complaint to me.

Q. Did Mr. Lubinski ever make any complaint to you about losing the sight in his left eye?

A. Well, that was after——

Q. Just answer; did he ever make any complaint to you about his eyes?

A. Yes, he made a complaint.



(Deposition of John Kristiensen.)

Q. When was that complaint made with reference to the fire at Kiska?

A. Well, that was a while afterwards, but I don't know how many days afterwards.

Q. Did he make any statement as to what caused the trouble with his eye at the time? [249]

A. No. He didn't make any complaint about where it came from. He said he had a sore eye.

Q. And his eye was sore?

A. Yes, it was; sure.

Q. No question about that?

A. No. Of course the doctor knows more about that. He was the one that attended to him.

Q. Did you send him to the doctor?

A. No, sir. He went to the doctor himself. Any time there was anything wrong they went to the doctor and he took care of them.

Mr. Franklin: That is all. Thank you.

### Cross Examination

By Mr. Levinson:

Q. Mr. Kristiensen, are you married?

A. Yes, sir.

Q. Your home is in Seattle? A. Yes, sir.

Q. Had you worked for the Alaska Steamship Company before you went to work for them in 1942? A. Yes. In 1926, I guess it was.

Q. You have had your papers for a long time?

A. I was in one of their ships for three or four months. Of course I sailed before the mast in those ships, off and on.

(Deposition of John Kristiensen.)

Q. Mr. Kristiensen, you were the first mate of the Flavel at the time of this voyage in question?

A. Yes, sir.

Q. And as such first mate you were in charge of the safety [250] of the ship during the time you were on watch and during the time you were on duty?

A. Yes.

Q. And as such you exercised general supervision over the entire vessel during your watch?

A. Yes. That is, when we are running and sailing and so on, when we are out to sea. Of course when I have the watch on deck I am responsible if there is nobody over me. If the skipper is there he is responsible.

Q. And your duty relates to the condition of the ship, both for the safety of the ship and for the safety of the personnel, that is, the members of the crew; that is right, isn't it?

A. Yes, sir.

Q. And that was a constant duty while you were on the ship?

A. Yes.

Q. Particularly while you are on watch, I should say.

A. Yes.

Q. You informed us that the Army was in charge of the loading of the holds of the vessel?

A. Yes.

Q. The Army had nothing to do with where you loaded your own ship's stores, or wherever you carried your ship's supplies? That is the job of the ship's officers?

A. The stores belong to the ship, yes.

Q. And you tell where they should be put?



(Deposition of John Kristiensen.)

A. Yes.

Mr. Franklin: On this voyage, you mean?

Mr. Levinson: On this voyage.

A. The stuff that belongs to the ship, like gear, out [251] I have nothing to do with the loading or unloading of the ship.

Q. Where is the spare gear kept on that ship, with relation to the booms and blocks?

A. That is kept in the lockers or storerooms. We also had some more storerooms in the ship where we kept gear. And the ropes they had up in the forepeak, all the rope.

Q. You also kept some of the gear up in the forepeak, did you not?

A. Yes, sir; off and on—odds and ends. But we had most of the gear in the storeroom amidships, or in the No. 2 mast house.

Q. The forepeak, of course, is designed primarily to keep the ship's gear in? You do not usually carry any cargo in there, do you? A. No.

Q. And the gear that the boatswain would call for, for instance if he had to repair a block or get some tools to assist in that repair, that usually comes from the forepeak, doesn't it, up in the carpenter shop?

A. Yes. He might have to go there for them.

Q. Certain kinds of wrenches are kept up there, aren't they?

A. Yes. Some there and some other places.

Q. That is common knowledge, of course, with the officer in charge, that the men were constantly

(Deposition of John Kristiensen.)

going in and out of there, looking for various parts of the ship's equipment they might need in the course of their work? Not constantly, but at least frequently.      A. Yes, that is right.

Q. If the boatswain needs any tools or special equipment [252] that is in the forepeak it is nothing unusual for him to send men up forward to get it?      A. No.

Q. That is his duty, in fact?

A. That is right.

Q. When you observed these smoke bombs and the food supplies which were stored on the deck it was your own suggestion or your order that they be placed in the forepeak to get them out of the weather.

A. Yes. That is the only place we had to put them. Lockers were very scarce aboard because they had everything filled up that they possibly could.

Q. However, it could have been possible, I assume, to have so stowed those on deck by covering them with canvas so they could be fairly secure and dry? That could have been done?

A. Well, they didn't have any so that it really could have been done. Of course it was rainy, and taking water over.

Q. It could have been done if they had the canvas or equipment on the deck?

A. But they didn't have any canvas to do that with. They didn't have any spare tarpaulins or anything.

Q. They didn't have any spare tarpaulins?

(Deposition of John Kristiensen.)

A. All the tarpaulins we had was on the hatches. We didn't have enough to put canvas over the soldiers. It was leaking through there where the fellows was sleeping. It was getting wet because it was leaking through the hatches.

Q. You didn't even have enough tarpaulin for the—— [253]

A. They had to get some tents from No. 2 hold to cover up No. 1 to stop the leak.

Q. In other words, if the ship had been properly equipped you would have had enough tarps?

A. Yes; if we had some spare ones. But you know how it is, the ship was fitted out as a new ship and they didn't have more than just enough tarps for the hatches, and that was very poor.

Q. Normally you should have spare tarps as part of the ship's equipment, particularly on a long trip like that?

A. Really there should have been, yes.

Q. And that is usually put on before the ship leaves?

Mr. Franklin: Are you referring to an invasion trip like this was, or generally?

Mr. Levinson: You can take him on redirect and do whatever you want to.

Mr. Franklin: But I do not think the witness understands you.

Mr. Levinson: If he doesn't understand me he is sufficiently intelligent to ask me.

Mr. Franklin: In other words, you are talking about one thing and he is talking about another.

(Deposition of John Kristiensen.)

Mr. Levinson: Let us see if we are. Read the question.

(Last question read.)

Q. (By Mr. Levinson): Those tarps are usually put on before the ship leaves?

A. We had a full complement of tarps, and that would be enough for the hatches, because I never figured any canvas for covering up things. In an old ship we [254] have old tarpaulins and we can cover up things. A ship that has been running for any length of time they always have some spares. But this was a new ship. We had enough tarpaulins for all the hatches—supposed to be, so they should be sufficient.

Q. It is good seamanship to usually have some spare tarps; isn't that correct, Mr. Kristiensen? That is, whoever sees to the supplying of the ship—it may not be the mate's job——

A. I am the one that is really supposed to order things, but so long as they had enough for the hatches that is all I care for, that there should be enough. But I don't know.

Q. Then if you had had some spare tarps you would not have had to put these supplies up in the forepeak where you kept the stores?

A. Well, we could have covered it up around there some place, I guess.

Q. Didn't the boatswain or some of the men make comment about that, that they should have been covered up?      A. No.

(Deposition of John Kristiensen.)

Q. As a general rule you do not carry any freight in the forepeak, do you?

A. No, sir; and there was no freight, either, exactly.

Q. Well, cargo, then?

A. No, there was no cargo.

Mr. Franklin: Ammunition?

A. No; there was no ammunition.

Q. Smoke bombs?

A. You cannot call that ammunition, because that is why we [255] have lifeboats. They have them in the lifeboats for distress.

Q. The smoke bombs?

A. Yes. We have them in the lifeboats. They put them on the water at sea, and in case we are in distress some ship can see them. That is what they are for.

Q. If they are used for your lifeboats they are stowed right in the lifeboats?

A. They are stowed right in the lifeboats. They are in the lifeboats now.

Q. But these were extra for the amphibious boats? A. Yes.

Q. They had nothing to do with your lifeboats?

A. They were for the landing barges.

Q. They were carrying the landing barges as cargo at that time?

Mr. Franklin: Ammunitions.

A. Well, you could call them cargo. It was equipment for landing. I cannot really see how that is

(Deposition of John Kristiensen.)

cargo, either. Which way you take it I don't know. I wouldn't take it for cargo myself.

Q. Mr. Kristiensen, if they were to be used as smoke bomb signals for landing barges they normally should be stowed in the landing barges like the smoke bombs are stowed in the lifeboats?

A. Yes. When they did not put them there they were lying on the deck.

Q. So you decided to put them in the forepeak?

A. Yes. All the food was lying around there. I thought it was a shame for it to be lying around. And also the [256] smoke bombs with it. It was all lying there and would get spoiled; malted milk and biscuits and crackers, and all that stuff. It was all mixed together.

Q. Who did you direct to put this stuff in the forepeak? A. I told the boatswain about it.

Q. Did you tell him exactly where to put it, or just tell him to stow it there?

A. I told him to put it down there some place. I didn't tell him exactly where to put it. I told him to put it down there somewhere in the forepeak.

Q. Did he make any objection to putting it in the forepeak, saying there wasn't any room?

A. No, he did not.

Q. Of course if he is in the ship's crew he doesn't make any objection to what the order is, does he? A. No.

Q. What kind of a sailor was Lubinski? Did he seem to be a pretty good sailor?

A. Oh, I wouldn't brag about him.



(Deposition of John Kristiensen.)

Q. Well, he seemed to know his business?

A. Well, I don't know. It was the first time he had ever been boatswain, and I don't think he knew much about it.

Q. He always seemed to be willing to follow his orders and try to do the best he could?

A. He was pretty good in the messroom, sitting talking in the messroom.

Q. Did you have any complaints about his work on the deck?      A. That was not out very much.

Q. Did you ever complain about it or reprimand him?      A. No. [257]

Q. Or ask him about it?

A. Well, once in a while I had a little argument with him.

Q. On a number of occasions?

A. Oh, a couple of times.

Q. Of course you could always replace him if he wasn't doing his duty, or report him to the skipper and the skipper could replace him?

A. You cannot replace anybody when you are out.

Q. You could replace him with some other man?

A. No.

Q. The skipper could?      A. No.

Q. He could do that to one of the officers, if necessary, couldn't he?

A. In a case like that, when you are out at sea like that, you cannot do anything until you get in port.

Q. How much space was there between the

(Deposition of John Kristiensen.)

hatchway, or the companionway, down into the lower forepeak, and the carpenter's bench on the starboard side of the forepeak, on that deck? How much space was there, about?

A. Just about a narrow space to walk.

Q. It would be about how wide?

A. About a couple of feet.

Q. And these smoke bombs were stowed under the bench and some on top of the bench?

A. No, none on top of the bench. They was just put on the floor. There wasn't so very much of it.

Q. Under the bench?

A. Some was put underneath. Some was outside.

Q. In other words, a man in walking along that passageway [258] would have to walk around or over the smoke bombs?

A. No. He could walk on both sides of the hatch. There is a hatch right in the center and you could walk there. And there was nothing on the other side.

Q. On the port side?

A. On the port side there was nothing.

Q. On the starboard side where the bench was, that is where the carpenter kept some of his tools?

A. No. The carpenter shop is in the after part.

Q. In the after part of the forepeak?

A. Yes. There is a carpenter's bench there, it seems to me like, for the carpenter to work on. Of course he never did any carpenter work on it, but it looks like a carpenter's bench. The carpenter shop is in the back there.



(Deposition of John Kristiensen.)

Q. Aft of it?

A. Yes. But for any long stuff you cannot get it in there because the door is too small, if there was any long lumber or anything like that.

Q. Where would a man go to get wrenches in the forepeak? Where were they kept?

A. We had some wrenches in there all right, but they didn't fit. They was too small, those wrenches we had in there. I don't know where they belonged. They didn't fit, anyway, most of the wrenches we had in there. The boatswain had some in his room, and the winch driver had some in his room.

Q. Were there a few wrenches up there?

A. He fitted saws and things like that up there, and had some marlin spikes there, and so on. [259]

Q. If a man was sent up to the forepeak to get a wrench or some equipment how would he go? Would he have to go either one side or the other?

A. He could go on both sides, but as a rule he would walk on the port side because that is the closest to the door. The door is over on that side.

Q. And it was also clear?

A. If he walked on the other side he had to walk over this way (illustrating).

Q. Around the hatch? A. Yes.

Q. However, those passageways were designed originally so they could use either side?

A. Yes; because there was a locker in the after part there. There is a locker in the after part.

Q. Could that be reached from either the star-

(Deposition of John Kristiensen.)

board or port side, or was the locker on one side or the other?

A. The locker was on the starboard side. There is no locker on the other side; just shelves for ropes on the other side.

Q. In order to get into that locker for some of these tools it would be a little closer to walk on the starboard side?

A. No. Oh, you mean to get into the locker?

Q. Yes.

A. Yes. To go into that locker it would save a couple of steps.

Q. Who granted permission for the men in the amphibious crew to work in the forepeak?

A. I did. [260]

Q. And the request came from the Ensign, or the man in charge?

A. Yes, sir.

Q. How long before the fire did you grant that request? That is, the fire in the forepeak?

A. Well, I don't know. They were working there for quite a while before that. They were almost finished when that started. They were just about finished.

Q. During the time those men were working there of course the crew had occasion to go into the forepeak to get some of their material once in a while, didn't they?

A. Yes.

Q. You said something about a key. The boatswain has a key to the forepeak?

A. Yes. He had a pass key for all the lockers.

Q. Suppose he sent a man up forward to get

(Deposition of John Kristiensen.)

some material, did he give him the key or was the locker open?

A. When those people were working there it was open all the time.

Mr. Franklin: By "those people" you mean the amphibious crew? A. Yes.

Q. On the day of the fire do you know if it was open, on July 15th?

A. Yes, I guess it was. I am not sure, but it must have been open.

Q. The boatswain had nothing to do with the loading of these bombs forward, except carrying out your orders? A. That is all.

Q. He didn't grant permission or he didn't suggest that they be moved up there? [261]

A. No. They were put there because he didn't want any more work than he had to.

Q. The boatswain didn't grant the permission for the amphibious crew to work in the forepeak, because he has no authority—that is up to you, isn't it? A. Yes.

Q. The first notice you had of the fire you were up in your room? A. Yes.

Q. And when you came down there was a lot of smoke coming out of that forepeak?

A. Yes.

Q. And you didn't know what was burning?

A. No.

Q. No one knew?

A. I couldn't make out what it was. I couldn't understand it. It was kind of a funny smoke, and

(Deposition of John Kristiensen.)

it smelled awful, and I couldn't make out what it would be.

Q. Did it occur to you at that time that it might have been the smoke bombs?

A. Yes. I began to think it must have been one of them.

Q. You thought about it afterwards, but at that time did that occur to you?

A. Well, yes, at that time I came to think about that. I told them it must be a smoke bomb. I told them to cut that water out because there was no fire. I had been down there and looked around and I couldn't see no fire.

Q. They had already been down there when you got there?      A. No. [262]

Q. When did they go down?

Mr. Franklin: He said he went down.

Q. Did you say you went down and saw no fire?

Mr. Franklin: He said he went down and then returned and ordered the water off.

A. That was after they had been down there looking around. They had been down, and I told them there was no use to have that water, to shut the water off, because the forepeak would be full of water, and there was no fire around. I couldn't see no fire anywhere.

Q. When you got there were they pouring the water in the forepeak?

A. No, no. I got there the same time as the rest of them, and they had just got the hose ready and started to put water down.

(Deposition of John Kristiensen.)

Q. Who suggested going down to find out what the trouble was?

A. Lubinski was the first one going down there.

Q. It was necessary to go down to find out what the trouble was? A. Sure.

Q. Did you give him your mask? A. Yes.

Q. Were there any other masks on the ship?

A. Well, there was one more mask there. I don't know whose mask it was, but there was one more mask.

Q. And Lubinski took the mask and went below?

A. Yes.

Q. And he was down there how long?—about five minutes, you say? A. Approximately.

Q. Of course you didn't keep a watch on him?

A. No.

Q. When he came up did he say whether he could find anything?

A. He couldn't see anything.

Q. He apparently was down there a full five minutes?

A. He said he couldn't find anything. He had been down in the lower forepeak and all around, and he couldn't see anything anywhere. And then I went down there.

Q. Were they still pouring water in it?

A. Yes.

Q. And things were probably floating around?

A. I couldn't see anything. Sather went down.

Q. You were down there about two minutes?

A. Yes; somewhere around there.

(Deposition of John Kristiensen.)

Q. And then Sather went down there?

A. I wasn't there very long.

Q. It was not very pleasant down there?

A. No; I will say not.

Q. And then Sather went down? A. Yes.

Q. How long was Sather down there?

A. Well, he wasn't down there very long, either.

Q. About the same time you were there; a couple of minutes? A. Yes.

Q. Did he take your mask or did he have his own?

Mr. Franklin: Did who?—Sather?

Mr. Levinson: Sather. A. Yes.

Q. He took your mask?

A. Yes. Then this gunnery officer went down.

Q. Whose mask did he take?

A. My mask.

Q. The only mask that was there was your mask?

A. Yes. Well, there was one more mask there.

Q. Who used that?

A. I don't know who used it, but there was another mask, because I picked it up when it was lying around there afterwards. Somebody said it was the wireless operator's. Somebody said that. I don't know. I even put a mask in my room after that. Nobody came and claimed it.

Q. When Lubinski went down he went down, of course, for the purpose of finding out what caused the fire? A. Yes.



(Deposition of John Kristiensen.)

Q. After Sather went down that is when you decided to stop pouring water in there?

A. Yes.

Q. In the meantime there had been a lot of water, and everything was floating around down there?

A. Yes. There was lots of water down there.

Q. Do you know if Lubinski went down again, afterwards?

A. Yes, he was down there a couple of times that I know of.

Q. Where were you when he went down after the first time?      A. I was up on deck.

Q. Did you see him go down?      A. Yes.

Q. He also had your mask again?

A. I imagine so. I don't know. I am not sure whether he used this one or the other one, but I know the first time he had my mask.

Q. The second time you don't know whose mask he used? [265]      A. No.

Q. And the smoke was still coming out of the forepeak?      A. Yes.

Q. As a matter of fact, it was Lubinski who finally brought that smoke bomb up?

A. I don't know.

Q. Somebody brought it up?

A. Somebody brought it up. Somebody found it back of the ladder there.

Q. Back of the carpenter shop?

A. No. Practically right down below—right in the hold there.

(Deposition of John Kristiensen.)

Q. That was not where it was stowed originally, was it? A. No, it was not stowed there.

Q. So it must have been floating around?

A. No; there wasn't that much to float it around. Somebody had been moving it.

Q. Somebody must have kicked it around after looking for it?

A. Somebody must have packed it up there to investigate it. They wouldn't kick it to find out what was inside of it, or take the cap off. Any time they get air into them they start to smoke.

Q. That is your theory—you didn't see what they did—you don't know?

A. I don't know, but that is the only way it could have happened.

Q. When you saw the bomb, you testified in your direct examination, it was all burned up?

A. It was burned up, yes.

Q. You do not know whether the cap was off or not? [266]

A. I wouldn't take fire any other way. Somebody must have monkeyed around with it.

Q. It is possible the cap might not have been screwed on right, and somebody knocked it over and the cap came off?

A. If they kicked it from below, from that bench up to that ladder, they must have played football with it. I don't know.

Q. It is possible if that cap had been loose that the jar of knocking it over would have loosened it and knocked it off? It is just a screw cap?

(Deposition of John Kristiensen.)

A. Yes, it is a screw cap, but it is not that loose. If they threw that carton all around the cap wouldn't come off.

Q. You don't know what kind of a mask or whose mask Lubinski used the second or third time he went down?

A. No. There was a man that had that mask, so I don't know.

Q. Were you there when Lubinski brought it up, or anybody brought it up, the bomb?

A. I can't remember, but I saw the bomb there.

Q. That was after the fire was out?

A. It was lying there behind the ladder, but who brought it up I don't know.

Q. You only know what you were told?

A. That is all.

Q. Any information you have as to where it was found is what someone told you?      A. Yes.

Q. And you saw it on deck?

A. I saw it on deck, yes. [267]

Q. And the fire was out when you saw it?

A. Yes. Still smoking down there.

Q. The bomb was not still smoking?

A. No. The smoke was coming up. It was chock full of smoke down there. Of course the bomb didn't smoke any more.

Q. Do you know if there was any complaint by Lubinski to anybody about his eyes between the first fire and the second fire?      A. No.

Q. About how often would you see Lubinski?—every day?      A. Yes.

(Deposition of John Kristiensen.)

Q. Did he seem to do his work all right during that time?      A. Yes.

Q. You didn't examine his eyes, or anything, during that time?

A. No, I didn't examine him. He went to the doctor.

Q. Do you know whether he went to the doctor during that time?

A. That is what he said. He went down there and the doctor gave him a shot. That is what he told me.

Q. He went down there to see the doctor?

A. He went to the doctor every day.

Q. After which fire?

A. After the Kiska fire. I don't know how many days after the Kiska fire. I don't know that.

Q. Did he ever tell you he had gone to see the doctor before the Kiska fire?

A. No. Not about his eyes, no.

Q. Do you know if he went to see him about anything else? [268]

A. I think he said he was sick, or something, or had a cold.

Q. Where were you when the fire started at No. 3 at Kiska?      A. In my room.

Q. When you were notified of the fire what did you first see when you came out of your room?

A. I saw smoke.

Q. How many men of the crew were around the hatch when you got there?

A. Oh, everybody was around there.

(Deposition of John Kristiensen.)

Q. The skipper was there?

A. They were all on deck. Everybody was there.

Q. Were any of the hoses broken out yet?

A. No, but we got busy on them right away.

Q. Who mends the hoses, do you know?

A. Oh, all hands.

Q. All of the crew; all of the sailors?

A. Yes.

Q. The destroyer came alongside a little later?

A. Yes.

Q. And you got a hose from the destroyer, too, didn't you?

A. Yes.

Q. Up to the time the destroyer was there you were using the regular ship's hose?

A. Yes.

Q. How long after you got there before you went down to the 'tween-deck?

A. What?

Q. You got there first, you got on the main deck and saw the fire coming out through the hold? [269]

A. Yes.

Q. And then you told Mr. Franklin you were down in the 'tween-deck?

A. I went down there. I went down to the door in the 'tween-deck.

Q. You went down through the manhole?

A. No. I went down in the crew's quarters. There is a door going into No. 3, and I went in that door there. I had a hose down there when I could get underneath the hatch coaming.

Q. So you could play the hose under the 'tween-deck?

A. Underneath the deck, you see, because when

(Deposition of John Kristiensen.)

you stay up there you couldn't get anything underneath. You go right down the hatch, and that is no good.

Q. Were any of the men down in the hold at the time you started to work your hose from the 'tween-deck?

A. No. They went down there all right, but there was so much smoke I couldn't see, but after it cleared up I saw Erickson and Benz down there, and the two soldiers.

Q. You don't know how many had gone down there before?

A. I don't know if there had been anybody down there except them fellows.

Q. Did you ever see Lubinski down there?

A. No.

Q. You don't know whether he was down there or not?

A. I do not; no.

Q. Do you know if any of the Steward's gang were working the hold with the hose?

A. No.

Q. Wasn't there a couple of the colored waiters handling [270] the hoses, too?

A. There might have been.

Q. There was a lot of confusion around there, like at any fire?

A. I wasn't up on deck. I was down in the 'tween-deck most of the time. I don't know what was going on up on deck.

Q. There had been hoses on the main deck?

A. Yes. There was a bunch of them standing up



(Deposition of John Kristiansen.)

there on deck with hoses. Who they were I don't know because I wasn't up there.

Q. They were playing the water into the hold?

A. Yes.

Q. There were also some men in the hold, and you don't know who they were?

Mr. Franklin: He didn't say that.

A. Yes; I knew who was in the hold.

Q. You knew Benz and Erickson were there, and a couple of soldiers? A. Yes.

Q. But you don't know that Lubinski was down there?

A. If he was the smoke was so thick I couldn't see him.

Q. The smoke was so thick for a while you couldn't see him? A. Yes.

Q. After this fire, that is when Lubinski started complaining about his eyes? A. Yes.

Q. You don't know whether he had a mask on when he went down or not? A. No.

Q. You don't know whether the mask was knocked off of him [271] when he went down or not? A. No.

Q. All you know is the part you took in putting out the fire? A. Yes.

Q. And after it was over you noticed a burned Jeep? A. Yes.

Q. And then a duffle-bag was burned?

A. Yes.

Q. You don't know what started it, except what somebody told you?

(Deposition of John Kristiensen.)

A. Somebody told me, that is all. And nobody else knows except the soldiers.

Mr. Levinson: That is all.

### Redirect Examination

By Mr. Franklin:

Q. Mr. Kristiensen, did you order Lubinski to stow these distress bombs in any particular part of the forepeak? A. No, I did not.

Q. What was the order you gave him?

A. I ordered him to take them down below, and then he took them down into the forepeak or some place to get them off the deck.

Q. Who decided where they were to be placed?

A. It must have been him put them there.

Q. How long would you say those smoke bombs were stowed where they were before the escape of gas, at Attu?

A. How long they had been down there?

Q. Yes.

A. Well, they stowed them down there on the way going up [272] to Alaska, going up to Attu, so they must have been down there for some time.

Q. How many days?

A. They must have been down there a month.

Q. How frequently would Lubinski be down in the forepeak?

A. Oh, I guess mostly every day.

Q. Who was in charge of the forepeak?

A. Well, he is the boatswain. He really is the one in charge. He has the key for it. He and I have a key.

(Deposition of John Kristiensen.)

Q. Who is in charge of policing up the forepeak, keeping it in order?

A. That is the boatswain. He has the gang to do it.

Q. Did Lubinski ever ask you for permission to move the smoke bombs from the forepeak?

A. No.

Mr. Franklin: That is all.

Q. (By Mr. Levinson): You say that is where they were during that month, under your instructions. You saw where those bombs were?

A. Yes, I saw them lying down there. I never took any notice. I never thought anything like that would happen.

Mr. Levinson: That is all.

Q. (By Mr. Franklin): Did you ever have occasion to go aft along the starboard side of the forepeak into the carpenter shop after those smoke bombs were stowed?

A. I walked back there mostly every day.

Q. Did you encounter any difficulty in walking along the starboard side between the hatch and the smoke bombs? [273]

A. No.

Q. Was there sufficient room?

A. Yes. There was about a couple of feet to walk. That ought to be enough.

Q. (By Mr. Levinson): How much light is down there?

A. Oh, the light is pretty good. Sometimes they might go out and they would have to put new globes in, change the globes. There is always a globe burned out. There is two globes there and one in

(Deposition of John Kristiensen.)

the carpenter shop, big ones. There is enough light down there. The same down below. There is lights.

Q. (By Mr. Franklin): Mr. Kristiensen, what kind of weather did the deckload encounter from San Francisco to Alaska?

A. It was not bad. It was pretty good, fairly good weather. There was rain, you know.

Q. Were you shipping any seas over the deck?

A. The spray. Of course it was too high to take real big seas, but it would take spray over.

Q. What effect did that have on the deck cargo before you stowed it down below?

A. Well, it go wet.

Q. That is all. Do you waive the reading and signing of your deposition, Mr. Kristiensen?

A. Yes.

Mr. Franklin: Then that is all. Mr. Levinson, do you waive the reading and signing of his deposition by the witness?

Mr. Levinson: Yes. [274]

(Deposition Concluded.)

Mr. Franklin: We offer the testimony just read in evidence.

The Court: It is received as part of the Respondents' case. We will take a recess at this time.

(Recess)

Mr. Franklin: We will now offer in evidence the deposition of Jorgen I. Seather, taken August 24, 1944.

JORGEN I. SEATHER,

called as a witness on behalf of Respondents, having been duly sworn by the Notary Public, testified on behalf of Respondents by deposition as follows:

Direct Examination

By Mr. Franklin:

Q. Will you state your name, please?

A. Jorgen I. Seather.

Q. Where do you live, Mr. Seather?

A. At 8039 Interlake Avenue, Seattle, Washington.

Q. What is your calling, Mr. Seather?

A. I am a Mate.

Q. You follow the sea?

A. I follow the sea.

Q. What licenses do you hold?

A. I am right now second mate on the "Delazon Smith."

Q. How long have you held a second mate's license? [275]

A. I have a mate's license now. I held a second mate's license for about a year.

Q. You now have a chief mate's license?

A. Yes, sir.

Q. How long have you held a chief mate's license? A. Nine months.

Q. Where have you sailed; what has been the extent of your sea service, in general?

A. On my license?

Q. On your license.

(Deposition of Jorgen I. Seather.)

A. On my license, Alaska mostly—Alaskan waters.

Q. How long have you been going to sea in any capacity? A. Seventeen years.

Q. You were an A.B. for how many years?

A. Say about 12 or 14. I couldn't say exactly.

Q. Was some of that experience in the Merchant Marine? A. Yes, sir.

Q. What nations?

A. The Norwegian Merchant Marine.

Q. Mr. Seather, during the year 1943, what vessel were you on as second mate? Limit it to about June of 1943. A. I was on the Flavel.

Q. Where did you join her?

A. I joined the Flavel in Seattle.

Q. Where did your voyage take you to?

A. We took the Flavel to Bristol Bay.

Q. Where did you go from Bristol Bay?

A. From Bristol Bay to San Francisco, where the Army took her over.

Q. What did you do at San Francisco? What was done with [276] reference to loading the vessel there, and what kind of cargo?

A. She was taken over by the Army Combat, loaded by the Army and sent north to Adak.

Q. Did you have troops aboard the vessel?

A. Yes, we had. I should say about 1200 or 1300.

Q. Did you have any Naval units aboard the vessel?

A. Yes, we had. We had some amphibious units on there.



(Deposition of Jorgen I. Seather.)

Q. How many were in the amphibious units?

A. Approximately fifty.

Q. Where was No. 3 hatch loaded?

A. At San Francisco.

Q. This was approximately the latter part of June, 1943? A. Yes.

Q. Do you now what was loaded in No. 3 hatch?

A. Yes. There was coal—I recall coal and snow jeeps.

Q. Who superintended the loading of No. 3 hatch? A. The Army.

Q. Did the Army supply you with any travelling personnel to handle the discharge of cargo after you left San Francisco?

A. Yes. We had two cargo security officers. One's name was Lt. Hill, and the other one was Lt. Hearst.

Q. Did they accompany the vessel to the Kiska invasion? A. Yes, they did.

Q. At the time you left San Francisco were you supplied with any gas masks?

A. Yes. We were issued regulation Army gas masks.

Q. By whom? A. By the Army. [277]

Q. Would you describe the gas masks, in general?

A. Yes. It is a mask form with goggles, tight fitting around the nose and eyes, and it has a charcoal container to purify the air.

Q. That fits in the mouth?

A. That fits in the mouth.

(Deposition of Jorgen I. Seather.)

Q. What equipment did the Naval Landing have aboard the vessel?

A. Just what was regulation for the landing crafts.

Q. Did they have some landing craft?

A. They had landing craft. We had ten of them.

Q. Where were they stowed?

A. We had six of them stowed forward, under No. 2 general, and forward end aft.

Q. Mr. Seather, prior to reaching Attu, Alaska, on or about July 15, 1943, did you see any smoke distress bombs belonging to these landing craft on the vessel?

A. No, sir; I did not.

Q. What was your watch?

A. Eight to twelve.

Q. That is, eight to twelve in the morning, and eight to twelve in the evening?

A. That is right.

Q. On July 15, 1943, were you on watch about ten o'clock?

A. Yes.

Q. Did you observe anything unusual in the vicinity of the forepeak?

A. Yes.

Q. State what you observed.

A. Well, I came forward amidships and I saw some red [278] fumes, what I thought was smoke, rising from the ventilators in the forepeak.

Q. How you had occasion prior to noticing this smoke to visit the forepeak on that trip?

A. No, I did not.

Q. What did you do?

(Deposition of Jorgen I. Seather.)

A. I went forward. There was a gathering of men up there, up around the forepeak, in the forward part of No. 1 hatch, and I went up there. They had already started springing some hoses. I could tell what it was as soon as I came up. I knew it was a daytime smoke signal.

Q. How did you know that?

A. You can tell by the color of the fumes.

Q. What was the color?

A. They are very reddish.

Q. Had you ever seen a daytime distress signal bomb explode before?

A. Yes, on several occasions.

Q. Then what did you do?

A. I told them to start dragging hoses around, and I ordered someone to get gas masks, and it is my recollection there was two or three brought up there.

Q. Where did you get your gas mask?

A. It was taken out of one of the rooms. I don't know. It was not mine. One of the A.B.'s got it, I don't recall who. I went to the forepeak and made a circuit. I didn't see anything. I couldn't locate.

Q. In making the circuit, would you just describe what you did? [279]

A. Well, I walked in the center of the storeroom aft of the scuttle, and aft of the ladder. There is a hatch opening that leads into a lower level, and I walked around that. I walked back as far as the bulkhead, and we made a circuit and came back

(Deposition of Jorgen I. Seather.)

on the other side, and looked around some, and came back on deck. I couldn't find it.

Q. Was anybody with you at this time, when you made your first tour?

A. Yes. There was two more men down there.

Q. Were they A.B.'s or officers?

A. One A.B.

Q. Do you recall his name?

A. No. I couldn't say who it was. I don't just recall. And the boatswain was down there.

Q. Mr. Lubinski? A. Mr. Lubinski, yes.

Q. How dense was the smoke when you were down there?

A. Well, it was just enough so that I couldn't locate the smoke signals.

Q. Could you see anything on your first tour of inspection?

A. Yes, I could see what was stowed down there, but I just couldn't locate the source of the smoke.

Q. Did you notice what was stored in the starboard side of the vessel? A. I don't recall.

Q. What did you next do?

A. I came back on deck for a breathing spell and stayed on deck for a little while, and went back down, and I made another round over approximately the same route. [280] I still didn't find anything, so I came on deck. While I was on deck this time the smoke signal was brought up.

Q. In making these two rounds of the forepeak, did you encounter any difficulty in walking

(Deposition of Jorgen I. Seather.)

along the starboard side or the port side or the forward or after part of the vessel?

A. There was some manila stowed there, but I didn't have any difficulty getting around.

Q. Was there ample walk-way space?

Mr. Levinson: That is objected to as leading.

Q. Was the space sufficient to enable you to make your rounds without any difficulty?

Mr. Levinson: I objected on the ground that the question was leading.

Mr. Franklin: It calls for a "yes" or "no" answer.

The Court: The objection will be overruled.

A. Yes; I got around.

Mr. Levinson: I move to strike the answer on the same grounds.

Q. Mr. Seather, how did you get down originally to the forepeak from the main deck?

A. I walked down the ladder.

Mr. Franklin: I will ask to have this picture marked for identification as Respondents' Exhibit No. 1.

Mr. Long: Does your Honor wish that same exhibit number to be carried on, where we called it Exhibit No. 1? [281]

The Court: We had Respondents' Exhibit No. 5 identified. Let this be marked as Respondents' Exhibit A-6 for identification.

(Respondents' Exhibits heretofore marked  
Respondents' Exhibits Nos. 1, 2 and 3 to the

(Deposition of Jorgen I. Seather.)

deposition of Seather, re-marked for identification Respondents' Exhibits A-6, A-7 and A-8, respectively.)

The Court: Does the same thing refer to Mr. Seather's deposition as at page 10, Respondents' Exhibit No. 1?

Mr. Long: In other words, Respondents' exhibit now marked A-6, is the one referred to in the Seather deposition as Respondents' Exhibit No. 1 for identification. There will be three exhibits in connection with this deposition.

Mr. Franklin: I will resume reading the deposition beginning at line 18, on page 10.

Q. (By Mr. Franklin): I will show you this photograph that has been marked for identification as Respondents' Exhibit No. 1 (A-6) and ask you if you can identify that picture and state what it shows.       A. Yes.

Q. What is it, please?

A. It is a photo of the storeroom, the hatch leading down to the lower storeroom. The hawse-pipe up forward, and this ladder leading down. These are bins or lockers.

Q. You are referring to the bins on the left side of the picture?

A. That is correct—on the starboard side.

Q. On the starboard side? [282]       A. Yes.

Mr. Levinson: On the left side of the picture?

Mr. Franklin: No; that is the left side over here (indicating).



(Deposition of Jorgen I. Seather.)

Mr. Levinson: From which direction was this picture taken?

The Witness: That is taken from aft, looking forward.

The Court: That particularly shows the bins on the starboard side?

Mr. Franklin: No.

The Court: I do not see any stairway.

Mr. Franklin: May I point it out to the Court?

The Court: I do not see any stairway in the picture.

Mr. Franklin: Right there, if the Court please (showing).

The Court: One would have to indulge a good deal of imagination, but I guess it is a stairway.

Mr. Levinson: It is an iron ladder.

The Court: Some persons might prefer to call it a ladder. Now, the hawse pipe——

Mr. Franklin: Right here, if the Court please (indicating).

The Court: Counsel is referring to a big pipe in the back center of the picture.

Mr. Long: Where the anchor chain goes through, your Honor, from the forecastle head.

The Court: It looks large enough to [283] accommodate such a passage. You may proceed.

Mr. Franklin: I will ask to have this picture marked for identification as Respondents' Exhibit No. 2, which will now be Respondents' Exhibit A-7.

Q. (By Mr Franklin): Handing you what has been marked for identification as Respondents' Ex-

(Deposition of Jorgen I. Seather.)

hibit No. 2 (A-7), I will ask you to state what that shows?

A. That is the starboard side, looking aft.

Q. What is the open compartment in the rear of the view?

A. That is a locker. That was built in the vessel when it came out of the yard.

Mr. Franklin: I will ask to have this photograph marked for identification.

Q. (By Mr. Franklin): I will show you what has been marked for identification as Respondents' Exhibit No. 3 (A-8) and ask you if you can state what that is?

A. That shows the hatch, looking aft, in the same storeroom. You can see the bulkhead there. This is about amidships.

Mr. Levinson: Mr. Franklin, if we may direct your attention to it, that is the exhibit that shows the new shelves put in after the fire.

Mr. Franklin: No; that is Respondents' Exhibit A-7.

Mr. Levinson: Respondents' Exhibit A-7 shows a different series of lockers and shelves on the starboard side, and those were put in after the fire. It is so agreed.

Mr. Long: After the smoke bomb. [284]

Mr. Levinson: They were not in position at the time of the fire.

Mr. Franklin: I think the deposition will so show.

(Deposition of Jorgen I. Seather.)

Mr. Levinson: I am not sure that it does, but that is the fact.

Mr. Franklin: Yes.

Mr. Levinson: The shelves that appear on the starboard side were not there.

Mr. Franklin: Can it be further stipulated, Mr. Levinson, that those three pictorial exhibits, marked Respondents' Exhibits A-6, A-7 and A-8, were taken of the forepeak of the SS "Flavel" on the dates indicated on the backs, which is, I believe, August 15, 1944?

Mr. Levinson: A year after the occurrence.

Mr. Franklin: Yes.

Q. What is the hatch in the center, where does that lead?

A. It leads into the lower storeroom. The storeroom is on two levels.

Q. In making your two tours of inspection, did you completely——

A. (Interposing): Yes, I circled this.

Mr. Levinson: That is objected to as leading.

Q. In which direction did you proceed?

A. I came aft on the port side, walked aft and came over to the starboard side. I looked around the ladders here and came up.

Q. How long after the smoke was discovered before the [285] smoke bomb was brought on deck, approximately?

A. How long from the time the smoke was discovered until the smoke signal was brought on deck?

Q. Yes; if you remember.

(Deposition of Jorgen I. Seather.)

A. I would say fifteen minutes

Q. Did you see the bomb after it was brought on deck?      A. Yes, sir.

Q. Would you describe its appearance?

A. Yes.

Q. First, let me ask you, do you know who brought it on deck?

A. I don't know just who brought it on deck. I couldn't say. It was brought on deck. It was just there. It was there for anyone to see.

Q. Just describe what it looked like.

A. Well, it was all black, burned out, and the plug was missing. In fact, there was,—oh, I should say four cases of these smoke signals brought on deck at the same time. They were all taken up.

Q. At the time you examined this smoke signal, could you describe its general appearance?

A. Well, it is a cylinder, about the size of a gallon can, approximately, and it has a screw plug in one end. This screw plug was missing.

Q. Then you say that some cases of these smoke bombs were brought out?

A. Yes; I should say four cases of them.

Q. Did you have occasion to examine all the cases, look at them?

A. Yes. One of them was broken open. [286]

Q. What kind of cases were they, as to material?

A. They were containers approximately,—oh, say, eighteen inches—16 to 18 inches square, and they had four of these smoke signals in there, with cardboard divisions in there.

(Deposition of Jorgen I. Seather.)

Q. You have testified that in one of those cases the cardboard covering of the case had been removed?

The Court: I think we will take an adjournment at this time.

Mr. Levinson: One of our proposed exhibits, Libelant's Exhibit No. 2, has been identified, but not admitted, and it will not be offered any further. Mr. Lubinski advises me that it is part of the records at the Union Hall, and I would like permission to remove that exhibit that has been marked for identification.

The Court: Is there any objection to withdrawing this exhibit and returning it to counsel?

Mr. Franklin: No, your Honor.

The Court: Then Libelant's Exhibit No. 2 is now withdrawn and returned to counsel who produced it.

(Whereupon, Exhibit heretofore marked Libelant's Exhibit No. 2, is withdrawn and returned to custody of Proctor for Libelant.)

Are there any details you gentlemen wish to speak of? If not, the court will be adjourned until tomorrow at ten o'clock in the [287] forenoon.

(Whereupon, an adjournment was taken until January 11, 1945, at the hour of 10:00 o'clock a.m.) [288]

January 11, 1945, 10:00 O'clock A.M.

The Court: You may resume the trial.

Mr. Levinson: Your Honor, I would like to inform you that I have a witness here, Mr. Robert T. Kenney, who was a member of the crew of this vessel. We pulled him off a ship that got in early this morning, and we arranged for his leave until noon. If your Honor wishes to finish this deposition rather than calling the witness now, I would ask leave to call him before he is required to report for duty again. It is a discretionary matter entirely with your Honor, because it is part of my case in chief, but the witness just got in this morning.

The Court: You have already rested your case?

Mr. Levinson: I have rested my case, but I will ask leave to re-open it for this purpose.

The Court: What is your attitude for the Respondents?

Mr. Long: I have no objection, your Honor.

Mr. Levinson: I have in mind that if your Honor would prefer, we might finish reading this deposition. I do not like to interrupt in the middle of the deposition, and he has enough time for us to finish this deposition.

The Court: I was thinking of the convenience of the witness. He doesn't have very much time ashore, and he is tied up all [289] of the time and I think in the interest of his own convenience, the Court ought to hear him now.

Mr. Long: I think this ought to be the last time counsel re-opens his case.



Mr. Levinson: The witness has just arrived.

The Court: He may come forward. The Libelant's case in chief is opened up for the purpose of hearing the testimony of this one witness only. His testimony may now be taken out of order, the deposition which was being read as part of the Respondents' case being interrupted for this purpose.

---

ROBERT T. KENNEY,

called as a witness on behalf of Libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

Br. Mr. Levinson:

Q. Will you state your name, please?

A. My name is Robert T. Kenney, commonly known as "Bud" Kenney.

Q. Are you attached at the present time to a vessel?

A. Yes, sir.

Q. And what is the name of that vessel?

A. The Makama. (?)

Q. What position do you occupy on that vessel?

A. Third officer. [290]

Q. When did that vessel get in here?

A. It got in this morning at 3:00 o'clock.

Q. Mr. Kenney, were you a member of the crew of the SS "George Flavel" on a voyage which commenced at San Francisco approximately in June of 1943, and which was subsequently involved in the Kiska invasion?

A. Yes, sir.

(Testimony of Robert T. Kenney.)

Q. Where did you join that vessel?

A. In San Francisco.

Q. In what capacity did you join that vessel?

A. Able bodied seaman.

Q. Then you have since been promoted to third officer?

A. Yes, sir.

Q. Mr. Kenney, in joining that vessel, tell the Court how you signed on down there, and how you joined the vessel?

A. First you go to the Hall and get a shipping card, and usually they put the name of the vessels up on the board, like this vessel was the "George Flavel," Alaska Steamship Company.

Q. Does the board indicate the operator of the vessel as well as the name of the boat?

A. Yes, sir.

Q. You have your choice of the jobs that are on the board?

A. Yes, sir.

Q. State whether or not the name of the operator is a factor in determining whether you will take the job or not?

A. Yes, it is. Some chaps do not like to ship with certain companies, for different reasons.

Q. How was the "George Flavel" indicated on the board at the time? [291]

A. Alaska Steamship Company.

Q. Now go ahead. Where did you sign on the "George Flavel"?

A. At San Francisco.

Q. Who did you think was the operator of the vessel at the time you signed on?

(Testimony of Robert T. Kenney.)

Mr. Franklin: That question is objected to.

The Court: The objection is sustained.

Mr. Levinson: I have in mind, your Honor, a specific problem, and frankly that is why I am asking this.

The Court: What is the problem?

Mr. Levinson: It is a question of law. Counsel has sought, and indicated prior to the introduction of evidence, to eliminate the Alaska Steamship Company as a respondent. I have some authorities I was prepared to present to your Honor to the effect that the Alaska Steamship Company, under certain statutes such as this, including the specific Agency Agreement upon which counsel relies, should remain as a respondent in this type of case, and one of the determining factors is what the seaman knew as to his employer, or proposed employer, at the time he joined the vessel, and it is for that reason I am asking this question, to relate to that particular problem, as the question of the employment by the Alaska Steamship Company of the Libelant is one of the issues, because it is denied in the answer.

The Court: Mr Levinson, the reason the Court is sustaining this objection, and possibly not sustaining objections to questions previously in your case propounded to another witness, which you may think were very similar to this question, is that this witness obviously is a very [292] intelligent witness, and I think the question is not proper over objection, considering the intelligence of this witness and

(Testimony of Robert T. Kenney.)

his experience, to let him state his conclusions. He can state the facts. It is upon that basis the court sustains this objection.

Mr. Levinson: I will reframe the question, your Honor.

The Court: Very well.

Q. (Mr. Levinson): Mr. Kenney, will you tell the Court the facts of your employment, how you were employed on the vessel, and the determining factor, what you did?

A. What vessel do you mean?

Q. On the "George Flavel."

A. On the "George Flavel" I shipped as able bodied seaman.

Q. Where did you sign the articles?

A. In San Francisco.

Q. At the time of signing the Articles, was any statement made to you that the operator of the vessel was the War Shipping Administration?

Mr. Franklin: If the Court please, it is obvious that any statement made to this man is immaterial in so far as the Libelant is concerned. The question is, if it is proper—which I do not think it is—what statements, if any, were made to the Libelant when he signed the Articles. What statements were made to other men is obviously not binding, and are immaterial.

Mr. Levinson: I will meet that objection by asking a preliminary question, if I may.

Q. (Mr. Levinson): Did all the men sign on together?

(Testimony of Robert T. Kenney.)

A. Yes, sir.

Mr. Franklin: The same objection, your Honor.

The Court: Are you going to show that such statements you asked about in the objective question were addressed to all the men?

Mr. Levinson: That is right, your Honor.

The Court: You may cover that preliminarily.

Q. (Mr. Levinson): At the time the men signed on was Mr. Lubinski there?

A. Yes, sir.

Q. Were you there? A. Yes, sir.

Q. It was in the office of the Shipping Commissioner? A. It was aboard ship, sir.

Q. Was any statement made at that time, in the presence of Lubinski and yourself and the other men, as to the fact that the War Shipping Administration was the operator of that vessel?

A. No, sir.

Q. Do you recall about when the vessel left San Francisco?

A. I remember it left on a Sunday. I can remember that.

Q. Do you remember how many days you were around San Francisco before you left?

A. It has been so long ago, and I haven't thought about this and I would be strictly guessing, but I imagine it was around about three days.

Q. Do you recall the occasion of a fire in the forepeak of the "George Flavel" while the vessel was at Attu, Alaska? A. Yes, sir.

(Testimony of Robert T. Kenney.)

Q. Immediately prior to the fire what were you doing?

A. I think we were working on the purchase, on the gear. [294] We had the block lowered down in the lower hold, and we were overhauling it.

Q. Do you recall who was working on that block at the time?

A. The boatswain, Lubinski, and myself, and three or four other sailors.

Q. That is, the deck crew? A. Yes, sir.

Q. At or about that time do you recall whether or not any person was sent from your crew to obtain any tools?

Mr. Long: I do not think counsel should lead the witness with every question. Let him tell us what he remembers.

The Court: Objection sustained.

Q. What was done at that time in connection with the obtaining of some tools?

A. I think we were trying to get the wire off the block, and we had to send up forward for another wrench, if I remember correctly, and some chap was sent up forward to bring the tools back, which he did.

Q. How did you receive the tools, how were they delivered to you?

A. I believe they let them down on a line, if I remember correctly.

Q. Do you recall a fire that occurred?

A. Yes, sir.



(Testimony of Robert T. Kenney.)

Q. How did you receive notice of that fire?

A. Somebody on deck hollered "Fire in the forepeak."

Q. With relation to the time you received the tools, how much time elapsed, if any, between that time and the cry of "Fire"? [295]

A. Oh, about four or five minutes, I imagine.

Q. What did you do when you received notice of the fire?

A. I immediately went up on deck.

Q. Who went up with you?

A. I remember that I went right behind the boatswain.

Q. When you got to the forepeak what did you see?

A. I saw a lot of orange smoke coming out of the hold.

Q. Do you remember whether the mate was there when you got there?

A. That I don't recall correctly, if he was there or not. I remember we ran up there. Everybody was excited.

Q. During the course of the fire was the mate there? A. Yes, sir.

Q. Do you know just about when he came?

A. Very soon after we got there.

Q. When I refer to the mate, I refer to the first officer. A. Yes, that is correct.

Q. Do you remember his name?

A. Kristiansen, I believe.

(Testimony of Robert T. Kenney.)

Q. Go on in your own words and state what occurred there.

A. I remember we all ran up forward and we saw this orange smoke coming out of the hatch there. We couldn't figure out what it was. We knew there was a magazine down in the hold, and everybody was pretty worried about it, and somebody, I don't remember who, brought these gas masks forward, and if I remember correctly, I think the mate told the boatswain to go below and see what he could find out, which he did, and he was down below and he came back up.

Q. How long was he down there the first time?

A. Oh, I don't imagine he was down over about eight minutes. It was pretty hard to stay down there.

Q. Tell what occurred after that, and what you did.

A. Then he came up and he was gasping for air, so he handed me the gas mask and asked me to go down, so I went down and he immediately came down with me, trying to find out what was down below. We couldn't find anything. We looked around, and they were pouring water in the hold at the time, so we came up again for more air.

Q. How long were you down there?

A. I imagine I was down there about five minutes.

Q. Do you know on how many occasions during that time Mr. Lubinski went down there, or can you give us any idea?

(Testimony of Robert T. Kenney.)

A. I don't recall correctly, but I do remember of him being down there practically every time. He was the one that went down. He was the one that led down.

Q. Were you on deck when he came up?

A. Yes, sir.

Q. Did you observe, or were you able to observe his appearance when he came on deck?

A. Yes, sir.

Q. Were you present when his gas mask was removed?      A. Yes, sir.

Q. Describe to the court what you found, what you saw about his appearance when he removed the gas mask.

A. I remember when he came out of the hold he had the gas mask on, and there was a lot of orange powder-like substance all over his face. Then he took the gas mask off and I remember it was under the gas mask, too.

Q. Can you describe this powder, or whatever it was? [297]

A. It was kind of orange in color. I imagine you could say it looked like talcum powder, I guess.

Q. Was it possible to brush it off?

A. I believe so, yes. I believe he did brush it off.

Q. What was your condition with reference to the powder, or this dust?

A. I remember when I came out of the hold, I had a burning in the throat, and my eyes were burning.

(Testimony of Robert T. Kenney.)

Q. What was your condition with reference to the powder, or this dust?

A. It was over my face and under the mask, just like the rest of the chaps.

Q. How long before the fire was out, about?

A. I don't remember correctly, but I imagine perhaps forty-five minutes we were up forward there. I don't remember correctly.

Q. Did any of the other boys go down, if you recall?

A. I believe that one of the officers went down.

Q. Were any of the other members of the crew down there?

A. Yes, I think there was one or more of the sailors—another sailor that went down, if I remember correctly.

Q. Were any of the other members of the crew around at that time?

A. Yes. I believe practically everybody was around at that time.

Q. After the fire did you ever see Lubinski around on the deck and on the ship?

A. After the fire?

Q. Yes.

A. You mean immediately afterwards? [298]

Q. Well, within the next few days.

A. Oh, yes, I saw him every day, talked with him every day.

Q. What was the condition of his eyes following that fire, if you recall?

(Testimony of Robert T. Kenney.)

A. I remember he was troubled with his eyes. He had some trouble with his eyes.

Q. In what way?

A. His eyes were burning.

Q. Was there any complaint made by Lubinski?

A. Yes. I believe he made a complaint to the chief officer.

Q. Was any treatment given him during that time, if you know?

A. She was equipped for troops, and I think we had on board an Army doctor. I think he washed his eyes out, or took care of them.

Q. How did your eyes feel after that?

A. My eyes burned a little bit, and I had a burning in the throat, but that was all.

Q. How long did that last?

A. I remember it lasted for maybe four or five hours and then went away.

Q. How long did your eyes burn?

A. I imagine it lasted perhaps two or three hours afterwards.

Q. Were there any other members of the crew, to your observation, who were affected in their eyes after the fire?

A. This other sailor—I believe his name was “Smokey,” he was complaining about his eyes.

Q. How long did that condition exist?

A. It seems to me he was complaining for quite a while afterwards, running into a couple of weeks, two or three weeks. [299]

(Testimony of Robert T. Kenney.)

Q. Were you on the ship when you had the second fire, at Kiska?      A. Yes, sir.

Q. Tell what you know about that. How was it called to your attention?

A. I don't remember a lot about the second fire. I think I was working aft then, and the alarm came for fire, and we ran forward. I believe it was No. 3 hatch. There was a lot of ammunition down there, so we grabbed the fire hose, and I had one fire hose, and I believe I was on the starboard side with a fire hose.

Q. Did you see Lubinski at that time?

A. I saw Lubinski when we went up to the fire. We were working aft, and all ran up there together.

Q. Did you see him in the hold at all?

A. I believe he went in the hold.

Q. Did you see him come out?

A. No; I don't recall.

Q. You do not know anything about him being struck by a hose or anything?

A. No; I don't recall that.

Q. Mr. Kenney, where did you sign off that ship?      A. In Seattle.

Q. Do you remember about when that was?

A. I believe it was in September.

Q. What have you done since then, briefly, and where have you been?

Mr. Franklin: That is objected to as immaterial.

The Court: It might show his experience; it might bear [300] upon his understanding. The objection is overruled.



(Testimony of Robert T. Kenney.)

A. Immediately after that I took the train to San Francisco and I went to school over at Alameda for four months, and then I shipped on this ship that I am now on as fourth officer, and I have been on this ship 11 months.

Q. In trying for an officer's job, is it necessary to take a physical examination?

A. Yes. You take a very strong physical examination.

Mr. Franklin: That is objected to, your Honor.

The Court: Objection sustained.

Mr. Levinson: I think it is material as showing——

Mr. Franklin (Interposing): Obviously, this witness cannot testify to the rules and regulations. That is not the best evidence of the rules and regulations in regard to the promotion of officers.

Mr. Levinson: Here is a man who was on the same ship and had an inferior position at the time, and the purpose of the examination is to show that in the normal course of promotion this Libelant would be unable to pass the physical examination that was given his crew-mate for an officer's job.

The Court: The objection is sustained.

Q. Just tell briefly where you have been since you joined the Makama? (?)

A. I shipped on the Makama (?) on March 17, in San Francisco. We made a trip to Australia, to Brisbane and Sidney, and then back to San Francisco, and then we shipped again. I have been out on it ever since then. I think this trip

(Testimony of Robert T. Kenney.)

has been six months on Articles, and we have been in New Guinea and any Island around there that [301] you could name.

Q. Was your ship involved in some of the landings made in some of the islands?

Mr. Long: As a matter of security, I do not think that he should divulge that information.

The Court: Do they take persons with only one eye in that service, the Merchant Marine?

The Witness: I do not believe so, sir.

Q. You say your ship got in here this morning?

A. Yes, sir.

Q. Have you ever seen Lubinski since you left the ship in September of 1943? A. No, sir.

Q. Have you seen him before this morning?

A. No, sir.

Q. Have you ever talked to me before?

A. No, sir.

Mr. Levinson: You may cross examine.

#### Cross Examination

By Mr. Franklin:

Q. You talked to Mr. Levinson this morning about the case, of course?

A. Oh, yes.

Q. As a matter of fact, you had forgotten all about it, hadn't you, it happening so long ago?

A. Yes, sir.

Q. Do you know when this fire occurred at Attu, the day or the month? A. No; I don't recall.

Q. Do you know whether it happened in the morning or afternoon or evening?

(Testimony of Robert T. Kenney.)

A. I remember it was in the evening.

Q. What time?

A. I imagine it would have been around nine o'clock at night. We were working overtime is how I happen to remember.

Q. You do not remember the name of the individual you say went forward to get some tools?

A. No, I don't remember.

Q. How would you remember that incident after this length of time, Mr. Kenny, that a man went forward to get tools? Isn't that a regular incident in the ship's work?

A. It would be an incident in the ship's work, but as it happened when the fire occurred, after it was over we were wondering who started that fire, and that came up. That is how I happen to remember that incident.

Q. Nobody knew who started the fire, is that it?

A. Nobody knew.

Q. And then in the discussion you sought to place the responsibility on somebody?

A. No. Everybody was asking who was down in that hold. You see, it was a smoke bomb, and they wanted to know who set it off. Somebody set that off. They just don't go off by themselves.

Q. Did you see the distress signal after it was brought up on deck?

A. Yes, sir.

Q. Did you see them before?

A. I remember they were down there, but I never paid much attention to them. [303]

(Testimony of Robert T. Kenney.)

Q. They were in carton containers?

A. I believe they were.

Q. Do you know how many were in a carton container?      A. No, I do not.

Q. Do you remember the type of top on each of the cans?

A. You know how a mayonnaise jar is——

Q. A screw cap?

A. ——it looked about that size, and it looked like that type of top.

Q. A cap one would have to screw on?

A. I wouldn't say screw, sir; it might have clipped on.

Q. Do you know?

A. I don't know; no sir.

Q. In any event, it was a cap that had to be removed by some external force to release the contents?      A. Yes, sir.

Q. Do you know the name of the individual who went forward to get the tools?

A. No; I don't recall his name, sir.

Q. If you don't recall his name, how do you remember how long he was gone?

A. I happen to remember the incident. I know the chap, but I can't recall his name.

Q. You say he was only gone five minutes?

A. It seemed just about that time.

Q. It might have been more?

A. In other words, it was a short time, is what I mean.

(Testimony of Robert T. Kenney.)

Q. You do not mean it was five minutes; it might have been five or ten or fifteen minutes?

A. I don't imagine it could have been fifteen.

Q. It might have been ten?

A. Perhaps, yes.

Q. If I understood you, you went down with an Army gas mask on?

A. I believe it was an Army gas mask, yes.

Q. A mask that fitted very tightly over the face?

A. Yes, it was a mask that fitted tightly over the face.

Q. And over the head?

A. Over the head, yes.

Q. And has goggles, glass goggles over the aperture for the eyes?      A. Yes.

Q. How does one breathe, what is the breathing apparatus?

A. It has a kind of a flutter valve at the bottom, and when you exhale it comes out there.

Q. That was the regulation type of Army gas mask that was given to all the sailors on the vessel?

A. Yes, I believe so.

Q. They were issued when you left San Francisco?      A. Yes.

Q. And of course this gas mask when it was adjusted covered the entire face?

A. Yes, when it was adjusted.

Q. If I understood you, when you came up after the exposure to the smoke, you had some powdery substance which was caked over the mask?

(Testimony of Robert T. Kenney.)

A. Yes.

Q. In other words, the mask served as complete protection to the face itself?

A. Supposedly, yes. [305]

Q. Well, it did, as a matter of fact, didn't it?

A. Yes, sir.

Q. Mr. Kennney, when this fire occurred at Kiska, can you place the date of it?

A. No, I cannot, sir. I haven't thought about this for a year.

Q. Can you tell us the time of the Kiska fire?

A. No, I really can't.

Q. All you remember is that it happened?

A. That is right.

Q. Did you look down into the hatch at any time when the fire was burning, or did your duties require you to work away from the hatch?

A. The first part was right at the edge of the hatch, yes.

Q. I suppose the dense smoke was billowing out of the hatch and around the coaming?

A. It was not that dense.

Q. As a matter of fact, the smoke, of course, obscured the vision of one looking in or out?

A. Yes.

Q. That was No. 3 hatch?                      A. Yes, sir.

Q. Mr. Kenney, with reference to your employment on this vessel in San Francisco, California, you knew before you signed on this vessel that she was a Liberty vessel?                      A. Yes, sir.



(Testimony of Robert T. Kenney.)

Q. That information is conveyed to members of the Sailors' Union before they are hired?

A. Yes, sir.

Q. Then you say the name of the agent that operates the [306] vessel, in this case the Alaska Steamship Company, is also given to you?

A. Yes.

Q. So that you and other members of the crew knew when you joined in San Francisco, knew from information given them by the Sailors' Union, that they were going to join a vessel for which the Alaska Steamship Company was the General Agent?

A. Yes, sir.

Q. And you knew, and the other members of the crew knew, that all Liberty vessels are owned and operated by the United States of America, the War Shipping Administration?

A. That I don't know for sure.

Q. You mean that is not a fact?

A. I don't know whether it is a fact or not. Maybe some of these companies own these ships, don't they?

Q. You knew this was a Liberty?

A. Yes.

Q. And this was not one of the regular fleet of the Alaska Steamship Company? A. Yes.

Q. You knew by reason of your sea-going experience that all Liberty vessels are owned and operated by the War Shipping Administration of the United States Government?

Mr. Levinson: I object to counsel's statement.

(Testimony of Robert T. Kenney.)

The Court: The objection is overruled. He can ask the question.

The Witness: What was that question?

(Last question read.)

A. Well, I don't know exactly. I know that the Maritime Commission has something to do with all the ships. [307]

The Court: Is there any common waterfront knowledge as to the status of the Liberty ship operation, as to whether or not they are operated by the War Shipping Administration or by private concerns?

The Witness: Most people, most sailors and sea-going people, take it for granted that the company—I don't believe they have ever thought of it that way. I know the Maritime Commission does have the ship.

The Court: Has there been any discussion in the Union Hall among the men?

The Witness: Not that I recall.

The Court: As to what interest the War Shipping Administration has, and also as to what interest the operating agent has in the ship's commerce and trade?

The Witness: Has there been any?

The Court: Any discussion among the men around the Hall. Did you ever hear any discussion about that?

The Witness: I have never, no. Since I have been going to sea the last few years I do not believe

(Testimony of Robert T. Kenney.)

I have been around the Hall over one day or so, to ship out.

The Court: Has the Union business agent made any statement to them?

The Witness: Perhaps so.

Q. (By Mr. Franklin): Mr. Kenney, you have seen collective bargaining agreements between the various seamen's unions and the War Shipping Administration of the United States?

A. Yes, sir.

Q. You knew, as a matter of fact, when you joined the "Flavel" in San Francisco, California, that your terms of employment were covered by a collective bargaining agreement? [308]

A. Yes, I did.

Q. Entered into between the Sailors' Union of the Pacific and the War Shipping Administration of the United States of America?

A. Yes, sir.

Q. Before you signed the Articles, Mr. Kenney, did you read the Articles?

A. I believe I read the rider on the Articles.

Q. The first page of the Articles sets out the name of the operator and owner of the vessel, doesn't it?

A. Yes, sir.

Q. And isn't it your recollection that these Articles that you signed in San Francisco showed that the United States of America was the owner and operator of that vessel, and that the Alaska Steamship Company was specifically listed in those Articles only as the General Agent?

(Testimony of Robert T. Kenney.)

A. Yes; I believe so.

Mr. Levinson: If your Honor please, I object to the question and ask that the answer be stricken. The Articles themselves are the best evidence.

The Court: The objection is overruled. This is cross examination.

Mr. Franklin: That is all. Thank you.

### Redirect Examination

By Mr. Levinson:

Q. Mr. Kenney, who are the working agreements referred to by counsel signed with, as far as the company is concerned?

A. I have never come in contact with working agreements or agreements between the Unions and the ship owners. I am [309] not familiar with them.

Q. Counsel asked you if you had ever seen these working agreements.

A. I believe on the Articles it does say the name of the shipping company, and something about the War Shipping Administration.

Q. In your opinion who is the employer when you go to work on these ships?

Mr. Franklin: That is objected to as calling for a conclusion.

Mr. Levinson: Counsel has opened that up.

The Court: The objection is sustained. You may ask him to state the fact.

Q. State the fact. Who was your employer when you joined that ship?

(Testimony of Robert T. Kenney.)

A. The Alaska Steamship Company.

Mr. Franklin: That is objected to as calling for the conclusion of the witness.

The Court: The objection is sustained. He can state what was said with reference to that, and what papers, if any, he signed, and if he has them with him he can bring them out and have them marked for identification.

Mr. Franklin: I ask that the answer be stricken.

The Court: It may be stricken.

Q. Have you any of your shipping papers in regard to the "Flavel" with you?

A. No, I have not.

Q. Was anything said at the time you signed on the "Flavel" about the War Shipping Administration being your employer, or the employer of the crew? [310]

Mr. Franklin: That is objected to as repetition.

The Court: I think that objection should be sustained, because I believe that question was asked.

Q. How is the name of the Agent or the operator of the ship posted on the board, do you recall?

Mr. Franklin: That has been gone into.

The Court: That objection is overruled.

Q. When you go to join a ship, what does it say on the board?

A. You mean in the Union Hall?

Q. Yes.

A. It usually has the name of the ship and the company.

Q. How does it usually read?

(Testimony of Robert T. Kenney.)

A. Well, it could be like this——

The Court: Do not say “could.”

Q. How was it.

Mr. Long: If he remembers.

A. “George Flavel, Alaska Steam.” That would be just about right.

Mr. Levinson: That is all.

Mr. Franklin: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Long: If the Court please, we were reading the deposition of Jorgen I. Seather, a witness on behalf of Respondents, continuing at page 14, line 11. May I ask if counsel has rested his case?

Mr. Levinson: Yes, I have rested.

Mr. Long: We can understand now that your case is rested? [311]

Mr. Levinson: Yes.

The Court: That is what the Court understands. You may proceed with the reading of the deposition of Mr. Seather.

---

### JORGEN I. SEATHER,

called as a witness on behalf of Respondents, testified further by deposition as follows:

Direct Examination—(Reading Continued)

By Mr. Franklin:

Q. Just describe the appearance of the cardboard case where you say one was missing.



(Deposition of Jorgen I. Seather.)

A. One corner of it was broken open, and this one smoke signal was out or missing.

Q. Do you know who had been working down in the forepeak immediately before the smoke was discovered issuing from the forepeak?

A. Yes. Some of the amphibious men had been working in the carpenter shop.

Q. Doing what? A. Repairing.

Mr. Levinson: How do you know? Were you down there?

The Witness: I know he had permission.

Mr. Levinson: But you were not down there. You didn't see it.

The Witness: No, sir; I wasn't down there, but the mate left orders it was all right for those men to work down in the forepeak, not to stop them when I came on watch.

Q. After the smoke, did you observe whether the amphibious units continued working in the forepeak or not? [312]

A. I beg your pardon?

Q. After the fire, what happened to the amphibious unit? A. I couldn't say as to that.

Q. What officers went down below to assist you, or to assist in controlling the smoke?

A. Well, the Ensign, Mr. Kidd. He was the officer of that amphibious force, commanding officer.

Q. Did any of the ship officers go down?

A. Not to my knowledge. Mr. Kristiensen was around there, but I couldn't say whether he went down or not. I didn't see him.

(Deposition of Jorgen I. Seather.)

Q. Mr. Seather, how long do you figure that you were exposed to the smoke from that distress bomb?

A. Oh, on each occasion, I should say five minutes.

Q. Did the smoke irritate your eyes?

A. No, sir.

Q. Did any of the other men or officers make any complaint to you that the smoke had irritated their eyes?

A. No, sir.

Q. Did Mr. Lubinski, the boatswain, at any time complain to you that his eyes had become irritated from exposure to this smoke?

A. No, sir.

Q. Did you see Mr. Lubinski frequently at the Attu smoke incident?

A. Yes; I saw him every day.

Q. He was on your morning watch?

A. No. He was on the day watch, but I saw him around the deck.

Q. What were his hours? [313]

A. Eight in the morning until five o'clock in the afternoon.

Q. And your morning watch was what?

A. From eight until twelve.

Q. So you were on the same watch, were you?

A. Yes; that is correct.

Q. Mr. Seather, could you approximate the time that you discovered the smoke escaping from the distress bomb in the forepeak on the evening of July 15, 1943?

(Deposition of Jorgen I. Seather.)

Mr. Levinson: Evening or morning?

Mr. Franklin: Evening.

The Witness: Evening.

Q. (By Mr. Franklin): What time, approximately?

A. What time of the evening?

Q. Yes, sir.

A. Approximately ten o'clock.

Q. Mr. Seather, after leaving Attu, on July 15, 1943, did you, or the "Flavel" arrive at the Kiska Beachhead on the morning of the invasion?

A. Did it arrive in there?

Q. Yes. A. Yes, sir.

Q. And that was approximately when?

A. Oh, approximately August 15.

Q. What time did the vessel reach Kiska? Was it in the early morning?

A. In the early morning.

Q. What time did you go on watch that morning?

A. From eight until twelve. Pardon me—I will take that back,—we were standing six and six then, the third mate and I were, so I was on from six o'clock in the morning [314] until 12 o'clock noon, and six o'clock in the evening, etc.

Q. During your watch on the morning of the Kiska invasion, what happened to the troops aboard the vessel?

A. Well, some of them disembarked. The biggest part of them. There was still some left on board.

(Deposition of Jorgen I. Seather.)

Q. What happened to the amphibious unit?

A. The amphibious unit had left the ship. They were gone most of the time. All the barges were off.

Q. The amphibious unit was doing what in reference to the ship?

A. They were shuttling men, ammunition and cargo, from ship to shore.

Q. How many hatches were open the morning of the Kiska invasion?

A. Two, to my knowledge,—No. 3 and No. 5.

Q. Who was in charge of the discharging from those hatches?      A. Lt. Hill.

Q. What character of cargo was in No. 5 hatch?

A. Ammunition and shells.

Q. Was your attention directed to any unusual event occurring on that morning in No. 3 hatch?

A. Yes.

Q. Will you state approximately what time, and what it was?

A. Somewhere between 900 and 1,000 in the morning, I should say.

Q. What was the unusual occurrence?

A. Well, we had the fire that morning. I was in the chart room at the time, or making some entry in the log and I thought I heard someone say "fire," so I went up [315] on the flying bridge, and there were several men up there, among others Lt. Morrow, or Ensign Morrow.

Q. Then what did you do with reference to fighting the fire?

(Deposition of Jorgen I. Seather.)

A. They said we had a fire, and I said, "Turn in a general alarm," so he pulled the switch over. I stayed long enough to watch him pull the switch.

I went down below, by the Captain's quarters, knocked on his door, stuck my head in, and I said, "We have a fire in No. 3, Captain," and he came on deck. I just went on right down below, down to No. 3 hatch. Lt. Hill was there stringing the water hose, or the fire hose. There was men gathering then. I went up in my quarters and got my gas mask, and by the time I got back there, there were several hoses, and they were already playing water down in the hold.

Q. Did you go out in the hold, then?

A. Yes, I went out in the hold then.

Q. What was the condition of the hold with reference to being filled with smoke?

A. Well, the smoke was somewhat dense, and there was quite a lot of water going in there.

Q. How long did you remain down in the No. 3 hold?

A. I was there until the fire was out.

Q. How long a period of time would you estimate? A. Oh, I should say half an hour.

Q. And during that time, who else did you see down in No. 3 hold, down in the lower hold?

A. Well, there was myself, Gil Erickson, the third mate; Benz; and Kerle, an A.B.; and I saw Mr. Kristiansen in the 'tween decks. [316]

Q. Did you see the boatswain, Mr. Lubinski, down in No. 3 at any time?

(Deposition of Jorgen I. Seather.)

A. No, sir; I did not see him.

Q. Mr. Seather, did you locate the fire?

A. No, sir; I did not locate the fire. We saw it. We knew it was there, and we played the hoses on it, and we knew the general direction, where it was.

Q. Where was the general direction?

A. It was in the after part on the port side, in the wing, you might say.

Q. In the wing of the lower deck of the hold?

A. Of the lower hold.

Q. After the fire was put out, what did you do?

A. I went to my room, changed clothes, and went back down there to determine the extent of the damage, as I had to make a log entry on it.

Q. Did you make a log entry of it?

A. Yes, sir; I did.

Q. What did you find on examination as to what had been burning?

A. Well, there was a snow jeep on fire, was the only thing damaged, that had been burned, I should say. Everything that could burn on it was burned on it.

Q. Was there anything else besides that? Was there evidence of anything else having burned besides the snow jeep?

A. No, sir—just anything that was lashed on the snow jeep. There was equipment belonging to the men, personal equipment.

Q. Do you know who the snow jeep belonged to, that is, whose property it was? [317]



(Deposition of Jorgen I. Seather.)

A. The United States Army.

Q. While you were making your inspection, did you have occasion to talk to any of the soldiers who were in that vicinity?

A. Yes. There was two men down in the hold when I came back down there, and they admitted—

Mr. Levinson: Your Honor will note that I made an objection on the ground that it is hearsay.

Mr. Franklin: I think it is proper for two reasons.

The Court: Is this cross examination or direct?

Mr. Franklin: This is direct examination, and I am asking the third officer if as a part of his official investigation, in connection with making an official log entry, he interviewed certain soldiers to ask what caused the fire. You cannot introduce the log entry for security reasons.

Mr. Levinson: That violates the rule, then.

Mr. Franklin: It is admissible for two reasons. It is primarily admissible because it is part of the *res gestae*, if nothing else, because the time element is so brief after this occurred. Secondly, it is obviously proper because it is a fact, an investigation required by law of all officers in the case of fire. [318]

Mr. Levinson: It is apparent this occurred about half an hour after the fire. The hearsay rule, of course, permits exceptions, but they must be spontaneous and not the result of any consideration. The time element is therefore important. In some cases a five-minute interval may be too long

(Deposition of Jorgen I. Seather.)

and would take it out of the *res gestae* rule, and in other cases it may take twenty minutes. But here we have an investigation made after the excitement is over, and the very reason for the rule is that a person would be inclined to tell the truth in excitement. Here it is a deliberate investigation, and certainly the *res gestae* rule does not apply. I submit the offer is in error.

The Court: May I see what each one has said in this deposition, and then you may proceed, Mr. Long.

Mr. Long: I was not present at the taking of the deposition, and I am little more than a spectator in this case, but it seems to me, your Honor, this matter being a case in Admiralty, the Court is permitted to hear and weigh, as the Court may see fit, pure hearsay, as far as that is concerned.

Here is a situation, it seems to me, where an officer not in connection with this man's lawsuit, but in connection with the [319] security of a ship full of ammunition, made an investigation to determine what the cause was, and he has testified as to what he found at that time. *Res gestae* may extend, as counsel says, from five minutes to several hours, by our own Supreme Court decision. It seems to me under all of the circumstances this is a situation where the witness would learn the truth from soldiers and officers of the United States Army, who have no interest in this lawsuit, certainly, or any other lawsuit. We cannot produce the log book entry.

(Deposition of Jorgen I. Seather.)

The Court: Where is the statement, if any, on that admission?

Mr. Franklin: Page 23, your Honor, lines 7 to 11, inclusive.

Mr. Levinson: May I respond?

The Court: You may respond.

Mr. Levinson: The only thing I would like to add is that the facts offered here are in support of the truth of certain statements made by the persons making the statements, that is, two soldiers, as evidence of facts which they relate. Standing by themselves, of course, they are hearsay, because they are not made under oath and there is no opportunity to cross examine them.

Counsel is seeking to bring them in on the basis of an exception to the hearsay rule, [320] that is, the *res gestae* rule, and the spontaneity which permits *res gestae* statements to be introduced is certainly gone from this case, because here is an investigation made after it has quieted down.

And the reference counsel made to the rule in Admiralty Courts that the Court may admit hearsay, certainly there is a great deal of latitude allowed, but when the hearsay appears in the form of a deposition, where the court does not have the opportunity to see the witness, and we do not have the opportunity to examine further on the point, certainly that situation would not permit hearsay in a deposition, where the court cannot even see the man, which may be a factor in determining whether it should go into the record.

(Deposition of Jorgen I. Seather.)

Mr. Long: Aren't we wasting time? Counsel, are you making any issue of the fact that the fire was caused by a jeep backfiring?

Mr. Levinson: You have to prove how it was caused, and this is not the proof.

The Court: The Court is of the opinion that the statement is not a part of the *res gestae*, and that it is hearsay, and that the objection to it should be sustained, and it is.

Mr. Long: We then wish to make an offer of proof, your Honor.

The Court: You may do that. [321]

Mr. Franklin: If the Court please, the Respondents offer to prove that if asked the following question: "While you were making your inspection, did you have occasion to talk to any of the soldiers who were in that vicinity?"—while the witness was making an official investigation to ascertain the cause of the fire—the witness would respond as follows: "As I said, right down in the hold there were two soldiers standing around that jeep. I asked 'What are you doing here?' and all they said, 'We were trying to start this up and get it out under the gear, and it back-fired and caught fire on us'."

That answer appears from lines 7 to 11, inclusive, on page 23 of the deposition of the witness Jorgen I. Seather.

Mr. Levinson: I object to the offer of proof, your Honor.

(Deposition of Jorgen I. Seather.)

The Court: The objection is sustained for the reasons previously stated by the Court.

Mr. Long: Your Honor will allow an exception?

The Court: Exception allowed. Does that matter end about the middle of page 23?

Mr. Franklin: Yes, your Honor.

The Court: You may resume the reading of the deposition there.

Q. What happened to the jeep after the fire was extinguished, [322] that you know of?

A. Well, it was taken out and taken ashore.

Q. During the period of time that you were down below fighting the No. 3 fire, did you experience any irritation to your eyes from the smoke?

A. No, sir.

Q. Did any of the other men you have mentioned who were down there complain to you that their eyes were irritated from the effects of the smoke?

A. No, sir.

Q. Did they all wear gas masks?

A. Yes, sir.

Q. What type of smoke was it that you experienced? Was it just ordinary smoke?

Mr. Levinson: The question is objected to as leading.

Q. What color was it?

A. Well, the same color as any rubbish smoke.

Q. When was it with reference to the fire at Kiska that you first noticed anything wrong with Mr. Lubinski's eyes?



(Deposition of Jorgen I. Seather.)

A. Well, I never noticed it. The first time I knew of anything wrong with Lubinski's eyes was when he went to a doctor at Kiska.

Q. You mean at Adak?

A. I mean at Adak. It was some time later.

Q. Can you tell us how many days or weeks, if you remember?

A. Well, we laid out there seventeen days. I should say three weeks, approximately.

Q. Did you subsequently make a log entry of the results of your investigation? [323]

A. Yes, sir. It is in the log. The log will show that.

Mr. Franklin: That is all.

### Cross Examination

By Mr. Levinson:

Q. Mr. Seather, as one of the officers on the ship, it is your duty, is it not, to exercise general supervision during your watch, at times when you are on duty, for the protection of the ship, the cargo, and the personnel?

A. That is correct.

Q. And that duty is to be performed even though there are some military or naval officers on the ship?

A. To some extent, yes.

Q. Even though the cargo may be loaded under the direction of the Army or Naval officers, you still have some supervisory duty in connection with the safety of such as distinguished from the place of stowage, and the availability for the voyage intended?



(Deposition of Jorgen I. Seather.)

A. Well, yes and no. I do not know what rights we exercise. It is very hard to determine, very hard to determine what rights we exercise.

Q. It is your job, is it, as near as you can, to see that this stowage, in a general way, is safe for both the ship and the crew?

A. That is correct; yes, sir.

Q. You know nothing, do you, about why the smoke bombs were stowed in the forepeak? Did you know the reason why they were stowed there? [324]

A. I didn't know any were stowed in the forepeak. That is out of my jurisdiction.

Q. As a matter of fact, the forepeak is supposed to have only the boatswains supplies and various supplies in connection with the ship?—normally that is correct, isn't it? You did not carry cargo there? A. That is correct.

Q. Can you tell us whether or not they were stowed in the forepeak because of the absence of sufficient tarps to properly protect them and stow them on deck?

A. No; I cannot tell you anything about that. I do not know about the stowage.

Q. When you were on watch and you noticed the fire on July 15, and the smoke coming out, who sent Lubinski down below?

A. No one was ordered below, to my knowledge. I was in charge, and I most certainly ordered no one to go. I went down below myself, and everything was well cared for.

(Deposition of Jorgen I. Seather.)

Q. When you got down there Mr. Lubinski was down there, wasn't he?

A. Lubinski was down there, I recall that.

Q. He was down there for the purpose of ascertaining the cause of the fire?

A. That is correct.

Q. And in the performance of his duty, as any good sailor should do, he did his best to protect the ship?

A. That is right.

Q. How long did he stay down in there?

A. I couldn't say.

Q. He was down there while you went above, wasn't he? [325]

A. Well, I cannot exactly say as to when he was down or when he came up. I recall I was down there, and I recall helping him on with the mask.

Q. That was on deck?

A. On deck, yes.

Q. He went down ahead of you?

A. No. I was the first man down.

Q. He came down behind you?

A. He must have come down behind me, and he came back out, oh, approximately a minute or so after I did. I couldn't exactly say.

Q. And then he went down again?

A. That I couldn't say. I recall he was in there.

Q. You do not know who actually brought the smoke bomb out, do you?

A. No; I do not. I didn't exactly see that.

Q. If Mr. Lubinski brought it up you only know

(Deposition of Jorgen I. Seather.)

what some of the men told you about that?

A. I don't know who brought it up.

Q. For the safety of the ship, it was ultimately necessary to find the cause of the fire, wasn't it?

You couldn't let it go on indefinitely? I mean from the condition at the time the smoke was coming out of there?

A. I knew what was burning there. As far as the safety of the ship was concerned, the safety of the ship was not imperiled at all by that smoke bomb. It would just burn out, and that would be all there was to it.

Q. Was there any danger of it destroying something else down below? [326]

A. No. I do not believe it was causing sufficient heat to set anything afire.

Q. Did you have hoses down below to put it out?

A. Yes, there was hoses down below, because we knew it was a smoke signal. It couldn't be anything else.

Q. How long were the hoses down there?

A. I couldn't say. A couple of minutes.

Q. There was a lot of them there?

A. Yes; there was some.

Q. Wasn't there a lot of things floating down below in that forepeak?

A. No, there was nothing floating.

Q. How long were you down there yourself? Did you just take that one turn around that you described when you were identifying the picture?

A. Say five minutes.

(Deposition of Jorgen I. Seather.)

Q. How thick was the smoke down there?

A. It was pretty thick. It was dense.

Q. How did you know who was down there with you?

A. Well, I know who was down there, because I saw them take their masks out.

Q. When?

A. When they came back on deck.

Q. You were not on deck when the smoke bomb was brought up and still burning?

A. I was not on deck then.

Q. Who brought it up?

A. I don't know. I couldn't exactly say. If I did see it I have forgotten it.

Q. You do not remember whether that was Lubinski or not? [327]

A. No; I couldn't say. Perhaps it was Lubinski. I don't know.

Q. Were you standing close enough to him to see who it was?

A. I didn't see it brought up. There were several cases brought up, and among those cases was the one broken open, and that one smoke bomb was missing out of there. That was lying on the deck. It was still warm from the chemicals. There were several men engaged in that deal, anyway. There was one at the top of the ladder, one probably half-way up the steps, and one at the top.

Q. Who was the one that passed up the bomb that was burning?

(Deposition of Jorgen I. Seather.)

Mr. Franklin: I think he said he doesn't know.

A. I don't know. My back was perhaps turned, and I didn't see it.

Q. How dense was the smoke the second time you went down there?

A. Somewhat the same. It had cleared somewhat I believe.

Q. Was the water still going on there the second time you were down? A. No, sir.

Q. How many times had you been down in the forepeak prior to the time of this fire?

A. Prior to the time?

Q. Yes.

A. Oh, I couldn't say. Many, many times. I was standby mate on that ship and I took her out of port in Seattle, and was standby mate on her at Todd's, and I was down in there probably half a dozen times a day.

Q. This photograph which has been marked Respondent's Exhibit No. 2 for identification, which is looking aft, [328] shows the locker on the starboard side, is that right?

A. That is correct.

Q. That is all ship's gear which appears to be in those lockers? A. Yes.

Q. What is on the port side, a similar arrangement?

A. A somewhat similar arrangement, yes. We have these two bins in here. This here seems to be extra. I don't know what that was for. It was put in later.

(Deposition of Jorgen I. Seather.)

Q. That did not exist at the time you were on the ship?

A. Of course, the space existed, but I don't recall what equipment was stowed in there.

Q. That is all ship gear that appears in this photograph?      A. That is right.

Q. Which indicates the purpose of the locker?

A. That is right.

Q. And you would not stow smoke bombs in there without crowding that, if that is the normal amount of ship gear?

Mr. Franklin: That is objected to. There is no showing that that was the amount of gear that was present at the time the bombs were stowed.

Mr. Franklin: If the Coure please, you will probably remember that yesterday when we were discussing these pictures, I stated the deposition would show that there had been some changes made, and they were introduced for general illustrative purposes, and did not purport to represent accurately the conditions existing as of July 15, 1943, at the time the smoke bomb escaped at Attu, [329] Alaska. This question is objected to because there is no showing that the amount of gear shown in these pictures, taken a year later, is the same amount present at the time the bombs were stowed.

Mr. Levinson: It is cross examination.

Mr. Long: I do not think the witness ever answered the question.

Mr. Franklin: Yes. He said that would be a sufficient space.



(Deposition of Jorgen I. Seather.)

The Court: Where?

Mr. Franklin: At page 32, line 5.

The Court: Will you read the question in its last form?

Mr. Long: Line 12, page 31: "And you would not stow smoke bombs in there without crowding that, if that is the normal amount of ship gear?"

The Court: I have some doubt whether or not the answer on line 5, page 32, is responsive to the question beginning on line 12, page 31, but you may proceed.

Mr. Long: I think the answer appears on line 3, page 32, the first answer, which is in the form of a question by the witness—"In under there?"

The Court: You may continue reading the deposition.

A. That would be sufficient space.

Q. You still think there would be sufficient space for a [330] smoke bomb? A. Yes.

Q. How big are those cases that the smoke bombs come in?

A. Oh, they stand about a foot high—I would say a foot high, and about sixteen inches square.

Q. And there were at least four that you know of?

A. I should say there was four of them, yes.

Q. Do you know if there were any more below?

A. No, sir; I do not.

Q. You do not know how many were down there as a matter of fact?

(Deposition of Jorgen I. Seather.)

A. I can recall some of them that were on deck. I should say four. That is the best I can do.

Q. You observed the particular smoke bomb that apparently caused the trouble after it was placed on the deck? A. Yes.

Q. Did you pick it up and look at it?

A. Yes, sir.

Q. What had happened to the cap?

A. Well, there just wasn't any cap.

Q. Did you ever see the cap around there?

A. No, sir.

Q. It has a screw cap, hasn't it?

A. That is correct.

Q. And if it is not put in tightly a jar would knock it out, wouldn't it?

A. No; a jar would not knock it out. It would have to be loosened, and it is a screw cap.

Q. It depends on how tightly it was placed in the opening?

A. Well, they are all supposed to be safe, and there are [331] several, to my knowledge, when they come aboard—we have several cases on board the ship right now. It is ship's gear regulation equipment.

The Court: You mean the cases of smoke bombs?—is that what he means in that answer?

Mr. Franklin: Yes, sir.

The Court: Mr. Levinson, do you agree that is what he means?

Mr. Levinson: I have an objection there, your

(Deposition of Jorgen I. Seather.)

Honor, which I am standing on. I only asked the question as to how tightly the lid was on, and he goes into the question of present equipment on the ship.

The Court: Do you think the answer is responsive, Mr. Long?—all of it?

Mr. Long: I would not pretend to segregate what is not responsive. The question was asked in an argumentative form, "It depends on how tightly it was placed in the opening?" and the witness testified it was screwed on, and the witness is trying not to be misled. I suppose he goes ahead to explain to counsel.

The Court: The words beginning with "and there" in line 11, and continuing to the end of the answer are stricken on the Libelant's motion. The words "Well, they are all supposed to be safe" will remain in the record.

Mr. Long: Frankly, I do not think that is responsive. [332]

The Court: Well, I am sorry, but I will not strike that because I do not think it should be stricken.

Mr. Long: Your Honor will allow an exception?

The Court: Exception allowed. If you wish to request that this be considered later I will reconsider the court's ruling.

Mr. Long: I am not chief counsel in this case, your Honor. If Mr. Franklin wishes to, he may.

The Court: Proceed.

(Deposition of Jorgen I. Seather.)

Q. (By Mr. Levinson): The duties of the boat-swain and the members of the crew with relation to ship's gear require them to go into that locker very frequently, do they not? A. Yes, sir.

Q. When you were down there at the time of the fire, what kind of light was around there?

A. There were the regular overhead lights.

Q. Were they on? A. Yes, sir.

Q. Could you see them through the smoke?

A. Yes.

Q. You were not present when these pictures were taken, were you? A. No, I was not.

Q. You do not remember whether this might have been the Flavel or any other Liberty ship?

A. All I can tell is that it is the forepeak of one Liberty [333] ship.

Q. It is the forepeak of a Liberty ship?

A. Yes.

Q. You are not trying to tell us that this picture in any way represents the condition of the forepeak at the time of the fire, are you? I mean with referenec to the way the floor is all cleaned up, and all that?

A. Well, I do not recall exactly the condition of the floor. I just walked over it, was all, and looked for the smoke signals.

Q. Did you have to feel your way around there looking for the smoke signals?

A. Well, yes, and no. I walked around there. I made a complete circuit there, and I couldn't see where the smoke was, so I came back on deck.

(Deposition of Jorgen I. Seather.)

Q. You mean you couldn't see where it was coming from?

A. No; I couldn't see where it was coming from.

Q. Was the smoke thick enough so that you could see the deck or too thick to see the deck, rather, as you walked around there?

A. No; it was not. It was not that thick.

Q. Couldn't you then ascertain where the smoke was coming from?

A. Well, I walked around there and looked for it. I just couldn't tell where it was coming from.

Q. Other than what the mate told you at the time you relieved him on the watch, you didn't know who was in the forepeak, did you?

A. I just knew it as "say-so", that the amphibious force had permission to work down there.

Q. You didn't know whether they were in fact working down there, did you?

A. I had not seen them down there, no. I hadn't seen them working there.

Q. You didn't know whether, during the time you were on watch, it was necessary for members of the ship crew to go into the forepeak?

A. Perhaps it was necessary.

Q. It is a very frequent occasion on your watch, or any watch, for that matter, isn't it?

A. To go into the forepeak?

Q. Yes.

A. Yes. We go into the forepeak; we take out gear and whatever is necessary.

(Deposition of Jorgen I. Seather.)

Q. You knew Mr. Lubinski?

A. I knew Mr. Lubinski; I knew him, yes.

Q. Did he seem to be a man that knew his business?

A. I refuse to answer that,—can I refuse to answer it?

Q. If your opinion is that he did not, you can so state.

A. I will say he was a sailor.

Q. Was he competent?

A. Yes; I would say so.

Q. Did he seem to perform his duties during the voyage?      A. Yes.

Q. During such time as he was on the ship?

A. Yes.

Q. Now, on this August 15th fire, who sent Mr. Lubinski down, if he was down, if you know—at the fire at Kiska, in the No. 3 hold?

A. I don't know that he was sent down at all.

Q. Did you see him down there at all?

A. No; I cannot say I saw him at all.

Q. Did you go clear down to the hold, or did you stay on the 'tween deck?

A. I was down in the hold.

Q. You found it necessary to take a gas mask down with you, didn't you?

A. I had one on, yes, for a protection.

Mr. Franklin: Pardon me—did you complete your answer?—I did not hear it—did you complete your answer before Mr. Levinson interrupted?



(Deposition of Jorgen I. Seather.)

Read the answer. (Last answer read). I did not understand the last few words.

Q. (By Mr. Levinson): How many hoses were going when you went down there in No. 3 hold at the time of the fire? A. How many hoses?

Q. Yes.

A. Well, there were several hoses in there—five or six.

Q. Do you know who was manning those hoses?

A. No; I do not know.

Q. They were being manned up on deck?

A. They were being manned up on deck.

Q. In fact, some of them were manned by some of the steward's department, some of the colored stewards?

A. Well, the entire ship's personnel; yes, sir.

Q. You also had some hoses over the side from a destroyer that came alongside, didn't you?

A. Yes, sir.

Q. And for awhile, with the knowledge that there were ammunitions in the hold, it was pretty exciting—you [336] didn't know what was going to happen?

A. Well, I was down below. I had the hose down below. I didn't know much about what was going on on deck.

Q. In the event that a man is injured, to whom does he complain with reference to any injury—who is he supposed to complain to?

A. He will tell the chief officer.

(Deposition of Jorgen I. Seather.)

Q. That is not your job; your job as second officer was not to receive complaints, was it?

A. No, sir.

Mr. Levinson: That is all.

Redirect Examination

By Mr. Franklin:

Q. Mr. Seather, you are at present a member of the crew of the Delazon Smith—you are at present second officer on the Delazon Smith, are you?

A. Yes, sir.

Q. And you are leaving at some unknown date for some undisclosed destination in the near future?

A. Yes, sir.

Q. You do not know whether you will be here at Seattle to testify in person in the event of the trying of this case?

A. No, sir.

Q. You do not know whether you will be here?

A. No.

Q. And you waive the reading and signing of your deposition in this case?

A. Yes, sir.

Mr. Franklin: Thank you, Mr. Seather. [337]

Mr. Levinson: We will waive reading and signature.

(Deposition concluded)

Mr. Franklin: If the Court please, the Respondents offer the deposition of Jorgen I. Seather in evidence, and we also offer the photographs.

The Court: They are marked Respondents' Exhibits A-6, A-7 and A-8. The deposition of Jorgen I. Seather is now received as a part of the Re-

spondents' case, and each of those Respondents' exhibits, A-6, A-7 and A-8 are now admitted in evidence.

(Photographs received in evidence as Respondents' Exhibits A-6, A-7 and A-8.)

(Recess)

Mr. Long: The next deposition, if your Honor please, is the deposition of Raymond L. Frick, taken on behalf of Respondents in San Francisco, California, on October 26, 1944. Mr. Edward R. Kay appeared for us as proctor for respondents, and Mr. Albert Michelson represented Mr. Levinson as proctor for Libellant. I think the first question is at line 19, on page 2.

The Court: You may read the deposition.

---

### RAYMOND L. FRICK,

called as a witness on behalf of Respondents, having been duly sworn by the Notary Public, testified on behalf of Respondents by deposition as follows:

Examination by Mr. Kay:

Q. (Mr. Kay): Will you state your full name and address, Mr. Frick?

Mr. Michelson: The same stipulation goes to all [338] this?

Mr. Kay: Yes.

A. Raymond L. Frick. Do you want the office address?

Q. Yes.

(Deposition of Raymond L. Frick.)

A. 233 Sansome Street, San Francisco.

Q. And you are an attorney-at-law?

A. I am.

Q. And associated with John H. Black and his staff?

A. I am.

Q. At this address?

A. Yes.

Q. Did you have occasion to discuss the claim being presented by the libelant, Walter Lubinski, with that gentleman?

A. Yes.

Q. And about when was that?

A. Oh, I think it was—the first time he came to the office was I believe approximately a year ago. I am not sure of that time, of course.

Q. I will show you here what purports to be a three-page statement, typewritten statement, of Walter C. Lubinski, bearing what purports to be his signature on each page, and witnessed by Shirley K. Oldroyd, under date of November 13th, 1943.

Mr. Michelson: Can I see it before he is questioned regarding it?

Mr. Kay: Yes. (Handing Mr. Michelson)

Q. Will you state whether or not you took that statement from Mr. Lubinski?

A. I did.

Q. And state just under what circumstances you took the [339] statement, and in what manner?

A. Mr. Lubinski came to the office on several occasions, and on one of the occasions after we had discussed his claim I asked him if he cared to give me a written statement in connection there-

(Deposition of Raymond L. Frick.)

with, and he said he was entirely willing to, and I had interrogated him at some length in an attempt to get his version of the circumstances of the situation, and then I called Miss Oldroyd in and dictated the statement to her.

Q. She is one of the stenographers here in this office?

A. Yes. And before I began dictating the statement I told Mr. Lubinski to listen to it carefully and make any changes or corrections that he saw fit to make.

Q. Now, the third paragraph of the statement reads as follows—

Mr. Mcihelson: Just a minute. It isn't in evidence yet.

Mr. Kay: Well, I am going to offer the statement in evidence. I will offer it in evidence at this time. (Reading)

“I had no idea who pulled this plug out of the distress signal as there were some twelve hundred troops aboard, about one hundred sailors in addition to the crew of the vessel, which numbered about fifty men.”

Is that the statement that he made directly to you?

A. Yes, that was his statement to me.

Q. Did you know anything about how many troops there were aboard this vessel, or how many sailors, or how many crew members exactly? [340]

A. No, I didn't.

(Deposition of Raymond L. Frick.)

Q. Was this the first time that you knew of any such situation?      A. It was.

Q. Now, all the other matters set forth in the statement, were they obtained from Mr. Lubinski himself, or from some other source?

A. All the information contained in the statement was obtained from Mr. Lubinski.

Q. At the time this statement was taken Miss Oldroyd then was in your office taking it down in shorthand, was she?      A. She was.

Q. And then after you completed the statement what did you do, or what did you have done?

A. Well, when she finished typing the statement she brought it into my office, and I looked it over and handed it back to her and told her to give it to Mr. Lubinski to read, and thereafter to secure his signature to it.

Q. Thereafter did you see Mr. Lubinski at any time?      A. Do you mean that same day?

Q. Or at any other time?

A. Oh, I saw him on subsequent occasions in the office.

Q. Did he at any time request or make any corrections or retractions so far as the statement is concerned?      A. He did not.

Q. Now, did you have occasion to refer Mr. Lubinski to Dr. Barkan?      A. I did.

Q. That is Dr. Otto Barkan of this city?

A. That is correct. [341]

Q. What was the purpose of you referring him to Dr. Barkan?



(Deposition of Raymond L. Frick.)

A. To secure a diagnosis from the Doctor as to the condition of his eyes, and to determine whether or not in the Doctor's opinion there was any connection between the condition of his eyes and the history he had given in connection with his employment on the vessel in question.

Q. Did you request Dr. Barkan to treat him or to give any advice as to treatment?

A. I did not.

Q. And then your sole purpose was merely to get a diagnosis?

A. That was the sole purpose.

Q. Did Dr. Barkan subsequently submit a report of his diagnosis? A. He did.

Q. And state whether or not he was paid through this office for that service?

A. Yes, he was.

Q. Did you send Lubinski to Dr. Barkan at any other time? A. No.

Mr. Kay: I believe that is all.

Examination by Mr. Michelson

Q. (Mr. Michelson): Mr. Frick, you don't know what took place up in Dr. Barkan's office between Dr. Barkan and Mr. Lubinski? I mean you weren't there? A. No.

Q. You don't know what happened up there of your own knowledge? A. No.

Q. Now, regarding this statement, will you please state just [342] the procedure you went through as to how the statement finally got into writing, that is, who asked the questions, and

(Deposition of Raymond L. Frick.)

whether they were taken down at the time, or just how it was done?

A. Well, I interrogated Mr. Lubinski in detail in an effort to get his complete version of the situation, after which I called in Miss Oldroyd and dictated the statement.

Q. You dictated the statement? A. Yes.

Q. In other words, your conversation with Mr. Lubinski was in question and answer form originally, is that correct, that is, you would ask him questions?

A. Yes, I would question him and he would answer my questions. I wouldn't say it was strictly a precise question and answer form. He simply gave me his version of the matter. I told him that my purpose was to ascertain all the circumstances and facts in connection with his claim.

Q. Now, some questions you did not have to ask him, did you, because you had heard them on the prior occasions, that is, you had heard the answers to those questions on prior occasions when you had seen him?

A. Oh, I presume that there may have been some matters that were touched upon in the statement or covered in the statement we had discussed before, because we had discussed the claim on a number of occasions in my office.

Q. Everything that Mr. Lubinski said was not put down, was it, in that statement?

(Deposition of Raymond L. Frick.)

A. Oh, the statement is not a verbatim account of what he said, no. It is the substance of what he gave me, and the statement is based upon information supplied me by [343] him.

Q. Now, you are employed by Mr. John H. Black?      A. That is correct.

Q. How long have you been employed by him?

A. Over fourteen years.

Q. Now, this matter was referred up to the firm of Bogle, Bogle & Gates by your office here?

A. No.

Mr. Kay: The other way around.

Mr. Michelson: Pardon me.

The Court: I think if you skip that it would be better. It is of no importance.

Q. (Mr. Michelson): Now, your work is the same as that of a claims agent, isn't it, in this office?

A. Well, I wouldn't say a claims agent. I would say my work embraces the handling of claims. It includes that among other things.

Q. You were not employed—that is, Mr. Black was not employed by the Steamship Company here in San Francisco?

A. I wouldn't know about that.

Q. Do you have any connection with the Fireman's Fund Insurance Company?

Mr. Kay: Well, just a minute. I object to that as incompetent, irrelevant and immaterial, and instruct the witness not to answer.

Mr. Michelson: That is all.

(Deposition of Raymond L. Frick.)

Examination by Mr. Kay

Q. (Mr. Kay): Mr. Frick, this libelant came in here presenting a claim against the Alaska Steamship Company as agent [344] for the United States of America, is that right?

A. That is correct.

Q. And in the course of his discussions as to settlement, you asked him to give you a statement concerning this occurrence out of which the alleged claim arises?

Mr. Michelson: Just a minute. Objected to as leading.

Q. (Mr. Kay): Well, is that correct?

Mr. Levinson: I am standing on the objection, your Honor.

The Court: The examination is by Mr. Kay. How many cross examinations have there been in this deposition?

Mr. Long: This is redirect, your Honor.

The Court: Did you want to speak further about it, either side?

Mr. Long: No.

The Court: The objection is overruled.

A. That is correct.

Q. And did Mr. Lubinski at any time in any of his discussions tell you that some member of the ship's crew was dispatched by him to the forepeak of the vessel for the purpose of getting a hand tool for the gear just prior to this incident in which the distress signal had released some smoke?

A. He did not.

(Deposition of Raymond L. Frick.)

Mr. Kay: That is all.

Examination by Mr. Michelson:

Q. (Mr. Michelson): Mr. Lubinski came in here and made a claim for the injury to his eye, is that correct, to his [345] eyes?

A. Yes. I don't know whether it was his eyes or his eye.

Q. Do you know who sent him in here?

Mr. Kay: I don't think that would be material, who sent him in here.

Q. (Mr. Michelson): If you recollect?

A. Well, as I recollect, he was—came in here at the suggestion or at the request of Messrs. Bogle, Bogle & Gates, in Seattle.

Q. (Mr. Kay): You don't know of your own knowledge, do you?

A. I really don't at this time know the circumstances under which he came in the office.

Mr. Michelson: That is all.

Mr. Kay: That is all.

(Deposition concluded)

Mr. Franklin: We offer the deposition of Raymond L. Frick in evidence, if the Court please, and since the signed statement Mr. Lubinski made has already been admitted in evidence without objection, it will not be necessary to read the deposition of Miss Oldroyd.

The Court: The deposition is admitted as offered, and becomes a part of the Respondents' case in chief.

Mr. Franklin: This is the deposition of Dr. Otto Barkan, if the Court please.

Mr. Levinson: At the outset I am going to object to the testimony of Dr. Barkan for two reasons, your Honor. First, it is our position that it is a privileged communication, and second, I received no notice of the filing of the deposition as required by the rules of this court. [346] I never saw the deposition until it was published for use in the trial of this case. Although I received notice of the taking of the deposition, I was not represented at the time the deposition was taken in San Francisco.

(Argument of counsel)

The Court: The court will not rule upon this matter now, but if counsel reminds the court of it, and there is further necessity of considering the matter that will be done at the beginning of the afternoon session, which will be at two o'clock this afternoon.

(Whereupon, adjournment was taken until 2:00 o'clock p. m. January 11, 1945.) [347]

---

January 11, 1945, 2:00 O'Clock P.M.

The Court: You may proceed with the matter on trial.

Mr. Levinson: Your Honor, with the press of work in the office I was unable to find time to look for better authorities. I will withdraw the objec-



tion I have heretofore made, and the record may so show, and that will eliminate talking further about it.

The Court: Then this is the deposition of Dr. Otto Barkan?

Mr. Franklin: Yes, sir.

Mr. Long: If the Court please, this is the deposition of Dr. Otto Barkan, taken in San Francisco, California, pursuant to notice de bene esse, Monday, July 24, 1944. The respondents were represented by Mr. Franklin, and there was no appearance on behalf of the Libellant.

DR. OTTO BARKAN,

called as a witness on behalf of Respondents, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified by deposition as follows:

Direct Examination

Q. (Mr. Franklin): Will you state your name, please?

A. Otto Barkan.

Q. And you are a duly licensed and practicing physician in the City of San Francisco, California?

A. I am.

Q. What specialty do you follow?

A. Ophthalmology.

Q. Of what medical school are you a graduate, Doctor?

A. Munich and London.

Q. Since graduation, will you briefly sketch your professional career?

(Deposition of Dr. Otto Barkan.)

A. I spent some six years doing post graduate work at my specialty; and started practicing in San Francisco in 1921.

Q. Have you limited your practice at all times since coming to San Francisco to diseases of the eye? A. I have.

Q. Doctor, are you at the present time a member of any of the teaching staffs of the medical departments of the state universities?

A. Not of the state, but of Stanford Medical School. I am not actively teaching, however.

Q. You are a member of the staff?

A. Yes.

Q. Doctor, did you have occasion on or about November 26th, 1943, to examine one Walter Lubinski? A. I did.

Q. At whose request did you examine him, doctor?

A. The office of Mr. John Black, I believe.

Q. Was the examination for the purpose of treating the man or for submitting a written report of your findings to Mr. Black?

A. For the latter purpose.

Q. At the time of your examination on November 26th, 1943, [349] Doctor, what did you find Mr. Lubinski suffering from?

A. He had a condition known as a chronic iridocyclitis of the left eye with a slight increase of intra pressure in that eye.

Q. How was the right eye, Doctor?

(Deposition of Dr. Otto Barkan.)

A. The right eye was normal in every respect.

Q. Doctor, in lay language what is an iridocyclitis?

A. It is an inflammation of the iris and usually of the neighboring membrane, the uvea.

Q. Doctor, where are the iris and the uvea located with reference to the outside of the eyeball?

A. It is the inner membrane of the eye.

Q. And the function of the iris, Doctor, is to permit light through?

A. To prevent light from going through except through the pupil, which is a hole in the iris.

Q. Doctor, at the time of your examination of Mr. Lubinski, did he give you a history as to the cause of the onset of this iridocyclitis?

A. He did.

Q. What did he tell you, Doctor, was the cause of it?

A. He told me that he first noticed trouble with the left eye in July, of 1943, on the Island of Attu; that at that time he had been exposed to smoke and fire as a result of which the eyelids were swollen for some ten days; and that when he opened his eyes, he noticed reduced vision of the left eye.

Q. Did he give you any history at that time, Doctor, of encountering any irritation of his left eye on July 15th, 1943, while at Attu, Alaska, when a distress signal [350] exploded in the fore-castle head of the vessel he was on?

A. No, he did not.

(Deposition of Dr. Otto Barkan.)

Q. Did he attribute his condition entirely to the exposure to smoke and fumes from the fire at Kiska on August 15, 1943?

A. He told me July, 1943, in Attu

Q. July in Attu. Yes. Did he make any complaint, Doctor, of being exposed to any irritation of his eye at Kiska, Alaska, in August of 1943, a month later?

A. Not specifically; but he said that while in the Aleutians from June to September as a deck officer, it had been very cold; and that he thought that had affected his eyes when on watch.

Q. Doctor, what is your opinion as to whether or not the condition of iridocyclitis in Lubinski's left eye which you found present in your examination was caused or aggravated by the alleged exposure to smoke or fumes of July 15th, 1943, at Attu, Alaska?

Mr. Levinson: I object to that question on the ground that it is not a proper hypothetical question and does not contain the necessary elements, or the elements upon which a true opinion can be based. It does not contain the elements of issue in this case. I was not there.

The Court: Isn't any doctor whose qualifications qualify him as competent to give his opinion, isn't he competent to give his opinion upon the cause of a symptom after he has professionally examined the man [351] physically and observed him and taken his history? Isn't that a matter for cross examination?

(Deposition of Dr. Otto Barkan.)

Mr. Levinson: That may be a matter for cross examination when those facts appear. Had the Doctor been here we might have been able to establish it, but as far as these facts are concerned, they do not appear on this deposition, and that is the only thing we have to go on, and that is the basis of my objection. It may have been in his mind—that is true, your Honor.

The Court: Mr. Levinson, suppose I go to your doctor, or to some doctor named by you, complaining of a headache, and the doctor named by you examines me, makes a physical examination of me in the course of his professional practice, and then two days afterwards somebody asks the Doctor if he saw me and examined me and he says that he did, and then asks him whether in his opinion my headache was related to any previous injury, don't you think the doctor would be permitted to state his opinion?

Mr. Levinson: In your Honor's statement of the facts, yes, but what your Honor has given me as a hypothetical statement of facts is not the situation in the case at bar, because your Honor is assuming a state of facts that does not appear here, that the doctor examined [352] you and that he obtained these facts. That may have occurred in this case—I do not know—but as far as the record is concerned it does not show that, because there is a specific group of facts at issue here, and nowhere does the record show that the doctor knew of those

(Deposition of Dr. Otto Barkan.)

specific facts. As a matter of fact the deposition shows that he did not have some of the facts that are at issue here. He refers to deck exposure, he was a deck officer,—he is not a deck officer. The witness refers to exposure on page 4 of the deposition; did he complain of being exposed to any irritation of his eye in August of 1943, at Kiska, a month later, and the witness said no, “but he said that while in the Aleutians from June to September as a deck officer, it had been very cold; and that he thought that had affected his eyes when on watch.” That is what I mean. He is basing an opinion on casual connection of facts which are not shown.

Mr. Franklin: That is what the man told him.

Mr. Levinson: That is not the question. The question before us here, and the question he is answering here is, “Doctor, what is your opinion as to whether or not the condition of iridocyclitis in Lubinski’s left eye which you found present in your examination [353] was caused or aggravated by the alleged exposure to smoke or fumes of July 15, 1943, at Attu, Alaska?”

The Court: Do you deny that the deposition shows that the doctor in the course of his professional practice made a physical and medical examination of this person?

Mr. Levinson: No; I cannot do that. It is obvious on the face of it. He said he was examined there at the request of Mr. John Black. I do not deny that.



(Deposition of Dr. Otto Barkan.)

The Court: I think that I am prepared to rule upon your objection.

Mr. Levinson: Very well.

The Court: The objection is overruled.

Mr. Levinson: I note an exception.

The Court: Exception allowed.

Mr. Long: I will read the question again.

Q. Doctor, what is your opinion as to whether or not the condition of iridocyclitis in Lubinski's left eye which you found present in your examination was caused or aggravated by the alleged exposure to smoke or fumes of July 15th, 1943, at Attu, Alaska?

A. I don't think that the condition could have been caused, precipitated or even aggravated by the fumes of the smoke as described.

Q. Why not, Doctor?

A. Because a condition of this kind is essentially an endogenous one. That is, it comes from an internal cause; and in my experience and in the literature, it would be [354] precipitated by an external injury, such as a bruise or contusion of considerable severity.

Q. Doctor, in your opinion, is the temporary inconvenience and discomfort produced by a person being exposed to smoke such as Mr. Lubinski was of a sufficiently severe character to aggravate or accelerate an iridocyclitis?

A. Not in my opinion.

(Deposition of Dr. Otto Barkan.)

Mr. Levinson: That question is objected to as leading, your Honor, and I move to strike the answer. I object to the question as incompetent. I was not there at the time.

The Court: That is direct examination, is it not?

Mr. Levinson: Yes, sir.

The Court: What do you say to that objection?

Mr. Long: Counsel had a right to be there. He was served with notice, and he was represented at all other depositions taken there. He could have been there to object if he so wished. The purpose of the question, of course, is on the matter of privilege.

The Court: Does any part of that question appear to have been testified to or established by the witness in response to any other questions?

Mr. Levinson: That is true, your Honor, I will frankly say. I will direct your [355] attention to the statement on page 3 of the deposition: "Q. At whose request did you examine him, Doctor?

"A. The office of Mr. John Black, I believe.

"Q. Was the examination for the purpose of treating the man or for submitting a written report of your findings to Mr. Black?

"A. For the latter purpose."

That is correct.

The Court: I will overrule the objection.

Q. Doctor, when you use the term "endogenous," do you mean some internal infection?

A. Yes.

(Deposition of Dr. Otto Barkan.)

Q. Doctor, what was Mr. Lubinski's sight when you saw him?

A. He could distinguish the movement of a hand in front of his eye in the central field of vision only.

Q. Was the progress of this disease characteristic when you examined Lubinski, Doctor, in November of 1943?

A. Yes, I should say it was.

Q. Did he tell you, Doctor, where he had been treated for that condition at the time of your examination?

A. I think I was informed that he had been treated at the Marine Hospital.

Q. And was under treatment when you examined him?

A. That I don't know.

Q. Doctor, after making your examination and conclusions, did you then submit a written report of your findings to the office of Mr. John H. Black, 233 Sansome Street, [356] San Francisco, California?

A. I did.

Q. At no time did you treat Mr. Lubinski?

A. No.

Q. Or offer any suggestions as to his proposed treatment?

A. No.

Q. Your examination was made solely and exclusively for the purpose of obtaining your views as to the relationship between this man's disease of the left eye and the claimed exposure to the fumes?

A. That is all.

(Deposition concluded.)

The Court: Do you offer this deposition in evidence?

Mr. Franklin: Yes, your Honor.

The Court: This deposition is received as a part of the Respondents' case in chief.

Mr. Franklin: We will call Dr. Morrow. [357]

---

DR. JAMES R. MORROW,

called as a witness on behalf of Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Franklin:

Q. Will you state your name, Doctor?

A. James R. Morrow.

Q. What is your calling?

A. I am a physician.

Q. Licensed to practice in the State of Washington?

A. Yes, sir.

Q. How long have you been licensed?

A. Since 1931.

Q. What specialty in the medical field, if any, do you follow?

A. Ophthalmology.

Q. Have you practised in other states besides the State of Washington?

A. Pennsylvania.

Q. Were you licensed to practice in the State of Pennsylvania?

A. Yes.

Q. Of what medical school or college are you a graduate?

(Testimony of Dr. James R. Morrow.)

A. Jeffreson Medical College, in Philadelphia, in 1914.

Q. What did you do upon graduation? Will you briefly sketch your professional career?

A. I served an internship and practised a year and ten months, and was then in the first world war for 18 months; I returned to practice and practised general surgery for 14 years, and then I specialized in eye, ear, nose and [358] throat, at the New York Post Graduate School in New York.

Q. How long a course was that?

A. A year and a half I was there. The course was approximately a year. I did special work afterwards.

Q. When did you take that special course?

A. In 1930.

Q. Following 1930 what did you next do?

A. I came to Seattle. And since then I have studied in the University of Minnesota and the University of Oregon, and George Washington University.

The Court: When did you begin your practice in Seattle?

The Witness: 1931.

Q. Did you restrict your practice to any particular field in Seattle in 1931?

A. Eye, ear, nose and throat.

Q. Have you practiced that specialty continuously up until the present time?

A. Until two years ago November I practised in ophthamology exclusively, diseases of the eye.

(Testimony of Dr. James R. Morrow.)

Q. Are you a member of any scientific or technical society of physicians that specialize in conditions of the eye?

A. I belong to the Puget Sound Academy of Ophthalmology.

I am a member of the King County Medical Society, the State Medical Society, and the American Medical Association.

Q. Do you hold any position in this city as a medical consultant in the field in which you specialize?

A. I am chief consultant and ophthalmologist at the Marine Hospital at Seattle. [359]

Q. How long have you held that position?

A. Since 1936.

Q. Did you at our request have occasion to examine Mr. Walter Lubinski with reference to a condition occurring to his left eye?

A. I did.

Q. Approximately when and where did you make that examination?

A. June 20, 1944, at my office.

Q. Did you make that examination alone or was somebody with you?

A. Dr. H. F. Thorlakson.

Q. At the time of your examination did you obtain a history of the onset of the trouble in Mr. Lubinski's left eye from him?

A. There was a history.

Q. Just state whether you did.

A. Yes.

Q. What history did Mr. Lubinski give you with reference to the onset of visual difficulty in his left eye?



(Testimony of Dr. James R. Morrow.)

A. In July of 1943, at Attu, there had been a smoke bomb exploded in the hold of the ship, and he went in the hold and was exposed to this smoke. Later the eyes became swollen and he noticed a few days later he was stumbling into things on the deck.

Q. Did you obtain any history from Mr. Lubinski of a subsequent incident occurring to his left eye at Kiska, Alaska, on or about August 15, 1943, when he was emerging from a burning hold, wearing a gas mask, and the gas mask was struck by a stream of water directed into the hold, so that he was exposed to the smoke while ascending from the [360] hatch?

A. No; I did not.

Q. In the light of the history obtained from Mr. Lubinski did you make an examination of his eyes?

A. I did.

Q. How thorough was your examination, Doctor?

A. As thorough as I know how to make an examination.

Q. To shorten it up, what conclusion did you reach as to the condition of Mr. Lubinski's left eye as the result of that examination?

A. Well, for practical purposes the eye was blind. He had no vision, but he had light perception on the nasal side, from the nasal field. That is the left eye.

Q. What did you find the vision in his right eye to be?

A. 20/25.

Q. How would you class that?

(Testimony of Dr. James R. Morrow.)

A. Well, 20/20 is normal, and 20/25 is only slightly less than normal.

Q. Did you find any explanation for any diminution of vision in the right eye?

A. There was a slight astigmatism present.

Q. Is that a chronic condition?

A. It is more or less of a permanent condition. Most people have some.

Q. From your examination did you reach a conclusion as to what was the cause of the loss of vision in Mr. Lubinski's left eye, as to the medical diagnosis?

A. He had an iritis or iridocyclitis, or uveitis, which all mean the same thing.

Q. What do they mean in plain language? [361]

A. They mean an inflammation. It must have been a sticky type or plastic type, because the iris was completely bound down to the lens and the posterior chamber and the anterior chamber—that is, the front and the back of the eye—was entirely separated by this bound down iris, known as the iris-bombay.

Mr. Franklin: I am going to ask that this chart be marked for identification.

The Court: It may be marked for identification.

(Chart marked for identification as Respondents' Exhibit A-9.)

Q. (Mr. Franklin): Dr. Morrow, handing you what has been marked Respondents' Exhibit A-9

(Testimony of Dr. James R. Morrow.)

for identification, I will ask you to state what that is.

A. It is a diagram of the anatomy of the eye.

Q. Does that exhibit reveal the portions of the eye involved by this iritis or uveitis?

A. It does.

Q. Would you kindly designate on that exhibit with a pencil the surfaces embraced in the diseased portion of the eye as revealed by your examination?

A. The dark yellow of the diagram here. The iris is a ciliary body, and the uvea a tract. The uvea tract is considered the middle coat of the eye, and the ciliary body is this large yellow body, which is connected. The uvea itself is inserted in the ciliary body.

The adhesion between the iris and the lens made a dense adhesion between these, so that the rear chamber, or posterior chamber, and the interior chamber were sealed off from each other. [362]

The Court: By what?

The Witness: By these adhesions. Fluid passes from the back to the front of the eye freely. So far as the circulation of the fluid is concerned, it stops the circulation.

The Court: Not so far as the passage of light through the lens is concerned?

The Witness: No. But it was completely contracted so that there was no practical space open. The pupillary membrane had formed, sealing off the light.

(Testimony of Dr. James R. Morrow.)

Q. Would you indicate on that exhibit where that had formed with the letter "A"?

A. Yes (indicating on exhibit).

The Court: Would both counsel feel better satisfied to be up here near the witness?

Mr. Levinson: Yes.

The Court: Come forward, both counsel, and see what the witness is doing. You may take any position that is available to you.

The Witness: This is the uvea tract, and this is the iris. This is the ciliary body, and the choroid is the central coat of the eye. The retina is inside and the sclera outside. This is a blood vessel coat which is always involved in this extensive iridocyclitis. Iritis means inflammation of the scleritis or ciliary body, and the uveitis of the uvea tract. They are used more or less synonymously. Iridocyclitis is probably the more common term. The whole thing is inflammation. Plastic exudate has formed in this case and cemented this over. [363]

Q. That is where you have indicated with the two letters "AA" on Respondents' Exhibit A-9 for identification?

A. Yes. It seals the chamber and it prevents the pupil from further dilation.

Q. Would you indicate, please, by an encompassing circle with your pencil the area embraced under the term "iritis?"

A. Yes. It would be just the iris.

Q. In so far as Mr. Lubinski's eye was con-

(Testimony of Dr. James R. Morrow.)

cerned, was there any further affliction of the tissues of the eye, other than the iris and of the lens?

A. We assume that the whole thing is, because in a destructive process of that severity it would be more than just the iris. We cannot see this, but we know from post mortem specimens, or from eyes removed, that this has been affected. I am referring to the ciliary body.

Q. And that joins the iris, does it not?

A. Yes.

The Court: Outside of the iris, is it not?

The Witness: Yes. It is right back of the joint of the cornea and the light portion of the eye.

Q. Where with reference to the external or internal surface of the eyeball are the iris and the ciliary body located?

A. You mean the relationship?

Q. With reference to the outside or the inside of the eyeball?

A. They are inside the eyeball.

Q. How deeply imbedded?

A. The iris is posterior or back of the cornea, which is the clear portion. The ciliary body is back of the sclera, which is the tough white coat of the eye.

Q. Is the iris and ciliary body also behind the interior [364] chamber?

A. The iris bounds the interior chamber. It is the rear boundary of the interior chamber.

Q. What is the condition of the structures of

(Testimony of Dr. James R. Morrow.)

the outside of the eye, designated as the cornea, as to their toughness of fibre?

A. The cornea is about 2 millimeters in thickness, and it is covered by epithelium, like the surface of your hand. Then there is a stroma in the middle.

Q. What is that?

A. It is made up of long laminated fibrous cells, one on top of the other, similar to that sort of thing (illustrating).

Q. What protection from external force have the iris and the ciliary body, against external blows or injuries?

A. It has the external epithelium and Bowman's membrane right inside of it, which is a thin membrane. I will draw a cornea. (Witness draws sketch) This is epithelium on the outside, magnified, of course, and then the membrane known as Bowman's membrane. Then under Bowman's membrane we have this stroma, which is made of laminated fibrous transparent cells, and we have an internal limiting membrane of a single layer of cells, epithelial cells. That is the contour there, about 2 millimeters in thickness. The epithelium is the top layer.

The Court: The top layer of the cornea?

The Witness: Yes. That goes completely across.

The Court: Did that epithelium show any signs of injury? [365]

The Witness: No, sir.

The Court: Are you absolutely certain of that?



(Testimony of Dr. James R. Morrow.)

The Witness: Yes, sir. The epithelium was intact.

Q. Did you note any external evidence of injury on any portion of the left eye, from your examination?

A. No scars were present. No evidence of external injury.

The Court: Were there any conditions on any of the layers of material under the epithelium showing injury of any kind, either from smoke injury or from external violence, traumatic injury?

The Witness: There was no evidence except the evidence of inflammation on the iris. The iris was degenerated and had lost color.

Mr. Levinson: This is largely magnified. What is the actual distance between the two?

The Witness: The eye is 25 millimeters long, and that would be two and one-half centimeters,—one inch, approximately.

The Court: What fraction of an inch is the thickness of the epithelium, that outside covering?

The Witness: That is microscopic.

The Court: Is that what you said was two millimeters?

The Witness: The whole cornea is two millimeters, the clear portion of the eye. Two millimeters would be about that thickness (illustrating) about as thick as two pencil lines.

The Court: Was any part of the cornea, either the outside surface, the inner material, or the in-

(Testimony of Dr. James R. Morrow.)

side surface of the cornea, was any part of the cornea injured [366] in any way?

The Witness: No, sir; no evidence of it.

The Court: That is all.

Q. (Mr. Franklin): Would you describe to the Court whether or not the eyeball itself is—what is the Canal of Schlemm?

A. It is marked here. This is the Canal of Schlemm (indicating).

Q. Would you put the letter “S” on that canal?

A. It is marked right here.

Q. Yes, but indicate where it is with the letter “S.”

A. Yes, sir. (Witness indicates on exhibit.)

Q. What is the function of that?

A. It is the drainage canal of the eye.

Q. Which way does it drain the fluid from the vitreous chamber?

A. The fluid from the posterior or rear chamber drains thru around the lens and into the anterior chamber, and is taken up by the ciliary veins from the Canal of Schlemm. You notice it is very close to the yellow portion, to the ciliary body, and the veins there are more or less open sluiceways.

Q. Then what happens to the fluid which is being drained from the eyeball?

A. It enters the ophthalmic vein.

The Court: You did not call that vein by the same name that you did before.

The Witness: It is the ophthalmic vein.

(Testimony of Dr. James R. Morrow.)

Q. Does that Canal of Schlemm serve as an intake valve or conduit? [367]

A. It drains fluid from within the eye to the body circulation.

The Court: What body?—the main body of the man?

The Witness: The main body of the man. The fluid from the eye drains into the ophthalmic vein and drains into the circulation of the blood.

Q. How many cases of iridocyclitis have you treated in your practice, or iritis?

A. It is a common thing. I do not have the exact number. Several hundred.

Q. What are the causes of iridocyclitis or iritis?

A. A great variety of causes.

Q. What are the general causes?

A. Well, we first look for focal infection, such as infected teeth, infected tonsils, arthritis, tuberculosis, syphilis, gout and many others.

The Court: This fluid from the eye that goes into the blood stream, is that a part of nature's function?

The Witness: Yes, sir; that prevents glaucoma.

The Court: In what way?

The Witness: It keeps the tension of the eye at a normal level.

The Court: It seems, offhand, rather strange to a lay mind like mine, that nature would make the blood stream a reservoir for the excretion of the eye. Tear production of the eye is excretion. It contains an impurity.

(Testimony of Dr. James R. Morrow.)

The Witness: That is the external portion. The tear is external to the eye. If you will allow me to explain—if you want me to—— [368]

The Court: I think that is sufficient explanation. I think this duct leads anyway back not only to the inside moisture of the eye, but also the tear production of the eye.

The Witness: The tear production is entirely external, while this is internal circulation inside the eye.

The Court: You need not go any further.

Q. (By Mr. Franklin): This fluid that you were talking about, where does it come from? Where does it collect before it is expelled through the Canal of Schlemm?

A. It is thought to be secreted by the ciliary body.

Q. In what portion of the eye?

A. In the posterior portion.

Q. By that you mean what, the inside or outside?

A. The inside of the eye.

Q. That is taken off by what method?

A. Through the Canal of Schlemm, and ultimately the ophthalmic vein.

Q. What methods does nature employ to relieve an eye that is attacked by smoke or fume irritation?

A. It produces a flooding of tears.

Q. Where do the tears develop, and explain what the function of the tears is in relieving such a condition.

(Testimony of Dr. James R. Morrow.)

A. The tears are secreted by the lacrimal gland, which is above and external to the eyeball.

Q. Where is it located with reference to being within or without the eyeball?

A. It is without the eyeball.

Q. And then what happens? [369]

A. Tears are secreted and they are carried away by the lacrimal duct into the nose, and if that cannot carry them they fall down over the face.

Q. What does nature do when an irritation develops in the eye from smoke or fumes, or any source which produces some irritation of the outside of the eye, as to eliminating that condition.

A. Well, of course you have the protection of the eyelids, and the tears are a flushing apparatus.

Q. Do the tears possess any properties in themselves to meet infection of the external surface of the eye?

A. They are mildly anti-bacterial.

Q. You mentioned some causes of iritis. State whether or not instances arise where the precise cause of iritis cannot be disclosed by a medical examination?

A. We see many cases that we cannot prove the cause.

Q. Why does that situation arise, under what circumstances? By the process of elimination is it possible to examine every possible source of infection in the human body?      A. No.

Q. And were the findings of your examination of June 20, 1944 typical and characteristic of an

(Testimony of Dr. James R. Morrow.)

eye which had been damaged from progressive iridocyclitis?

Mr. Levinson: I object to that as leading.

The Court: I think it is. I think it is unnecessarily so.

Q. Doctor, are you familiar with the characteristic progress of the disease of iridocyclitis?

A. Yes, sir.

Q. How does that compare with what you observed upon your [370] examination of Mr. Lubinski?

A. Mr. Lubinski had the result, the end result—

Mr. Levinson (Interposing): Just a moment. I would like to ask a preliminary question. I think I am entitled to it.

The Court: It is difficult for me to say.

Mr. Levinson: It relates to the question of privilege.

The Court: Very well.

Mr. Levinson: Are you on the staff of the Marine Hospital?

The Witness: Yes, sir.

Mr. Levinson: As such a member of the staff, did you ever examine the record of Mr. Lubinski in the Marine Hospital.

The Witness: I did not examine the records.

Mr. Levinson: That is all the questions I have.

The Witness: I am only connected with the one here.

Mr. Levinson: That is what I mean, the Marine Hospital in Seattle.



(Testimony of Dr. James R. Morrow.)

The Witness: I did not treat Mr. Lubinski.

Mr. Levinson: I understand, but as a member of the staff did you see the record?

The Witness: I would have no opportunity to examine the record unless I treated him.

The Court: Just answer the question; did you or did you not?

The Witness: No, sir.

Mr. Franklin: What was the last question?

(Last question read.) [371]

Mr. Levinson: I think that question is objectionable unless it refers to the characteristic found in Mr. Lubinski's eye.

Mr. Franklin: I think that is a proper question.

The Court: You may proceed.

The Witness: Mr. Lubinski's eye was the result, almost the end result of an iridocyclitis.

Q. (Mr. Franklin): Is there anything unusual about the condition of his eye, compared with the ordinary case that you would encounter in treating that condition?

A. I would not expect to lose the eye.

The Court: Would you make your answer more direct. Can you answer "yes" or "no?"

The Witness: I cannot recall the exact wording of the question.

The Court: Read the question.

(Last question read.)

Mr. Franklin: Which has progressed to the extent that Mr. Lubinski's eye had.

(Testimony of Dr. James R. Morrow.)

The Witness: Yes. It is unusual.

The Court: Can you comment upon why you think so, or if you know or have any opinion as to why? Will you discuss that?

The Witness: Well, in the first place, not many eyes are lost. That is what makes it unusual.

The Court: You mean lost to practical use, as his left eye is now?

The Witness: That is right.

Q. (Mr. Franklin): Doctor, you mean ordinary treatment might have prevented the condition in which his eye is? [372]

Mr. Levinson: That is objected to as leading.

The Court: Ask him what he means.

Q. What do you mean, Doctor?

A. I mean that it is unusual for an eye to be lost with an iridocyclitis. Damage is frequently due to frequent attacks, but to see one that is completely lost is unusual. It has happened only once in my experience, I think, so it is unusual.

Q. By the term "lost," what do you mean?

A. Lost for use of station.

Q. I will ask you whether you have any opinion as to the cause of the loss of vision in Mr. Lubinski's left eye?

A. I could not answer, except that he has had a severe inflammation, and the eye is lost.

Q. I will ask you whether in your opinion the condition which you found Mr. Lubinski suffering from was caused by exposure of his eyes to smoke distress bombs in Attu, Alaska, on July 15, 1943,

(Testimony of Dr. James R. Morrow.)

when he testified that he was obliged to go down in a forepeak for the purpose of ascertaining the cause of a smoke explosion, with a gas mask, and made several trips in that vicinity wearing a gas mask during those times?

A. I do not think smoke caused his iridocyclitis.

Q. In your opinion, assuming further that Mr. Lubinski on August 15, 1943 was in a hatch at Kiska, Alaska, the cargo of which was on fire, and for a period of 20 or 30 seconds a gas mask that he was then wearing was knocked off from his face so that he was exposed to the burning fumes of the contents of the hatch, I will ask you whether in your opinion his iridocyclitis could have been caused [373] by that incident?

A. It is not caused by smoke or gas.

Q. I will ask you if in your opinion either incident, at Kiska, Alaska, or Attu, Alaska, within the interval of a month, could have aggravated into activity an existing iridocyclitis?

A. No; I think not.

Q. Are you familiar with the type of iridocyclitis produced by injuries?

A. Yes, sir.

Q. Will you tell the Court what type of injury can produce an iridocyclitis?

A. Traumatic iridocyclitis is rare. We haven't any perforating injuries, or where there has been an ulceration of the surface of the eye, allowing bacteria to enter.

(Testimony of Dr. James R. Morrow.)

Q. What is necessary with reference to the penetration of external tissues of the eye for iridocyclitis to be classed as traumatic or due to injury?

A. There would be external evidence of injury.

Q. Where?

A. Anywhere within the eyeball that was perforated.

Q. Did you find any evidence of perforation or penetration of the external surface of Mr. Lubinski's eye from your examination?

A. No, sir.

The Court: Did you find any evidence on the outside of that cornea, or on the outside of the eyeball, of any external injury?

The Witness: None.

The Court: Trauma or other outside injurious conditions? [374]

The Witness: No, sir. Scars would remain, you see.

The Court: You think if once an eye got hurt by the pressure of a heavy stream of water forced against the eye, the outside of the eye, that recovery from it would show a scar, or show some evidence of injury?

The Witness: I can only cite experience. I have seen blood in the eye from external injury.

The Court: Blood inside of the eye?

The Witness: In the inside. But no iridocyclitis had developed. That is the only way I can answer that.

(Testimony of Dr. James R. Morrow.)

The Court: Have you seen any blood or scar on the outside of the eye caused by any such agency as a heavy pressure of water forced upon it?

The Witness: No; I have not.

The Court: State whether or not you saw any such symptom as that I mentioned on Mr. Lubinski's left eye.

The Witness: I did not.

The Court: On the outside?

The Witness: I did not, no, sir.

Mr. Franklin: That is all.

The Court: You may cross examine.

### Cross Examination

By Mr. Levinson:

Q. Dr. Morrow, are you a member of the American Board of Aphthalmology? A. No, sir.

Q. The only board you are a member of is the Puget Sound [375] Academy, is that right?

A. That is right.

Q. You have made quite a number of eye examinations for the firm of Bogle, Bogle & Gates?

A. Over a period of years, yes.

Q. And this man was sent to you in connection with a claim, and you knew you were coming down here to testify?

A. I didn't know I was to testify. I was asked to make an examination.

Q. That was the purpose of doing that?

A. I may or may not have known there was a claim. I was asked to make an examination.

(Testimony of Dr. James R. Morrow.)

Q. As to the casual connection?

A. And report.

Q. You were asked to determine, if possible, the cause of the condition?           A. No, sir.

Q. You were not asked to determine the man's condition?

A. I was asked to make an examination.

Q. Were you asked to determine the relationship between the man's personal history and the condition that you found?

A. I do not recall. I was probably sent a letter and asked to make the examination. I do not now recall any of the details. I know they have never specified in any request what I was to look for.

Q. Then at the time you made your examination you did not have in mind the question of the possible cause of the condition you found in Mr. Lubinski's eye, is that right?

A. Well, it was a late date to look for cause. I reported the findings. [376]

Q. This examination took place when?

A. June 20, 1944.

Q. That was almost a year after the happening of the occurrence, is that right?

A. That is right.

Q. For that reason you felt you were unable to determine the cause?

A. It would be rather late to look for a cause, I should think. Had I been treating the patient I certainly would have gone to some lengths to find



(Testimony of Dr. James R. Morrow.)

the cause, but in an office examination we have very little means of determining cause.

Q. In other words, two things prevented you from really finding the cause of this. The first was the nature of your examination, you were not able to make the other physical examination by way of blood test and things of that nature which might determine the question of cause—that was one?

A. Sometimes it takes months to find a cause.

Q. Anyhow, you were not in a position to give this man that kind of examination, and did not?

A. I had no such intention.

Q. The second one was the date of the examination, compared to the date of the injury. It was so great that in your opinion there would be very little evidence of the causal connection?

A. That is right. I think the eye itself had gone beyond the place where it was active.

Q. In other words, the condition had become fixed? [377]      A. That is right.

Q. Does that carry along with it the necessary changes in the cornea?

A. There were no changes in the cornea at that time.

Q. Isn't it true that a year after the alleged incident that any scars or changes in the cornea would have been covered up or changed?

A. Scars of the cornea are permanent.

Q. Do you give it to me as your professional opinion that scars of the cornea, no matter how minute, always remain after a long period?

(Testimony of Dr. James R. Morrow.)

A. There is always evidence of scar where there has once been a scar.

Q. Irrespective of the size or nature of the injury to the cornea?

A. No. All injuries do not leave scars.

Q. A very small piece of steel, with high force, may enter the eye and leave no evidence on the cornea, is that correct?

A. No, that is not correct. If a piece of steel perforates the cornea, there is evidence. It might not be easily seen, but it is there.

Q. Six months afterwards? A. Yes.

Q. A year later?

A. If you use a slit lamp you will see the scars.

Q. Even with a microscopic piece of steel?

A. I do not know if a microscopic piece of steel pierces the eye or not. I have never known one to.

Q. Will you answer the question. I asked you if in the event [378] it did pierce the eye, it would leave a scar.

A. If it was microscopic, there would not be any evidence.

Q. It depends on the size and nature of the trauma; that is correct, isn't it?

A. Microscopic evidence could not be seen by the naked eye.

Q. Doctor, you then did not look for the cause of this man's condition at that time you examined him: you are only giving your guess now as the result of notes that you took at that time?

A. I did not try to determine the cause.

(Testimony of Dr. James R. Morrow.)

Q. And iritis and iridocyclitis are produced by many things, both exogenous and endogenous in nature? That is correct, isn't it?

A. Severe external injuries, yes, sir.

Q. It is a very unusual condition, isn't it? I mean, you do not find it as the result of some illness or injury? It is not common in man?

A. On the other hand, it is common in man.

Q. It is common in eye injuries?

A. Not eye injuries. I beg your pardon. I thought you asked me if iritis was common.

Q. That is right.

A. It is more iritis. We treat it constantly.

Q. In treating iritis, you look for the causes?

A. Yes, sir.

Q. And in determining the cause, you use a process of elimination? A. Yes, sir.

Q. You go from the most obvious and keep checking them off and eliminating those until you find the one that might [379] be the cause?

A. Yes, sir.

The Court: Name some of the most common causes of iritis.

The Witness: Focal infections, such as infected teeth, infected tonsils, infected gall bladders, appendicitis, rheumatism, arthritis, acute syphilis, tuberculosis and other infectious diseases.

Q. Did you go into this man's history of his prior condition of health?

A. Not extensively.

Q. You asked him if he had syphilis?

(Testimony of Dr. James R. Morrow.)

A. I sent him to the laboratory to determine that.

Q. You went a step further, you had him examined? A. Yes.

Q. What was your finding?

A. Negative. The Wasserman was negative.

Q. That is the test you took? A. Yes.

Q. And you concluded there was no syphilis?

A. That would be my conclusion.

Q. Did you look at his teeth?

A. No, sir; I looked at his mouth. I had no X-rays.

Q. Did you find any evidence of infection in his mouth? A. No.

Q. At least, you had no complaint of any bad teeth? I am going to be fair with you. I want to know if you could find any cause of this condition as far as anything inside of Mr. Lubinski's system was concerned.

A. I didn't go into that in this examination, because it was not pertinent. [380]

Q. But as far as you knew, you had to assume that there was no cause there, because you found none, isn't that correct?

A. It is neither correct nor incorrect. I was just not required to and had no need to do it.

Q. Let us put it this way: you found no evidence of any systemic condition?

A. That is right. I didn't make a physical examination, other than as to the condition of the eye.

(Testimony of Dr. James R. Morrow.)

Q. As far as your examination and report was concerned, there was no endogenous cause for this condition, is that correct?

A. I didn't report any cause.

Q. Did you find any endogenous cause?

A. I didn't look for it.

Q. And then you don't know?

A. That is right.

Q. Now, Doctor, in examining a patient, you are compelled to rely largely upon his history, are you not?

A. We always take a history.

Q. And in other words, you take the objective symptoms, what the man tells you, and what you find?

A. That is right.

Q. Your subjective symptoms are important to rely upon?

A. Yes.

Q. Did you obtain from this man any subjective symptoms, or any endogenous condition?

A. No, sir. He said he was in perfect health.

Q. Did you have any reason to doubt that statement from looking at him? [381]

A. No, sir .

Q. Iritis just doesn't happen, there is always a cause for it?

A. I think so.

Q. It is not one of the things that sometimes unfortunately occur to you—there is some cause for it—and you have eliminated, haven't you, all the endogenous causes at least as far as your knowledge is concerned?

A. No, I have not: I haven't eliminated any cause, because I didn't go into that.

(Testimony of Dr. James R. Morrow.)

Q. You knew of no endogenous causes, is that correct? A. That is correct.

Q. And if you eliminate the endogenous causes, then the only thing remaining is the exogenous causes?

Mr. Franklin: He said he has not eliminated them.

Mr. Levinson: He said he found none.

Mr. Franklin: Yes, but he said he didn't eliminate them.

The Court: He said he didn't try to find any, as I understood him.

The Witness: That is correct. If I had been treating the man——

Mr. Levinson: I think I can develop it further. I thought he said he knew of none, and the man told him he was in perfect health, and as far as he could see, he was in perfect health. That is correct, isn't it?

The Witness: That is correct.

Q. (By Mr. Levinson): As a hypothetical question, if you eliminate the endogenous causes, it leaves only the [382] exogenous causes, that is right, isn't it—because iritis just doesn't happen.

A. I didn't say I eliminated any.

Q. Let us assume you eliminate them. Then you have only left the exogenous causes.

A. If you did eliminate everything endogenous, then you would have the exogenous, yes.

Q. There are various kinds of irritations to the eyeball caused by various chemicals, are there not,



(Testimony of Dr. James R. Morrow.)

that set up a different reaction to the eye, depending on the nature of the chemical?

Mr. Franklin: Referring to the external?

Mr. Levinson: Referring to the external, yes.

Mr. Franklin: Not the internal.

The Witness: I just do not quite understand the question.

Mr. Levinson: I will reframe it.

Q. (Mr. Levinson): The eye being covered by moist mucous membrane, when the membrane comes into contact with various types of gases it has a reaction depending upon the nature of the gas with which it comes in contact, is that correct?

A. Yes.

Q. In other words, they vary, depending on the type of gas?

A. The type and length of time of exposure.

Q. There are some types of smoke irritants which are very mild and have very little effect on the eye?

A. I don't know about that.

Q. You have some that have very little effect?

A. I have been in rooms filled with cigar smoke many times. [383]

Q. But the reaction of the eyeball to the fumes of ordinary wood smoke, and to the fumes from a picric acid container, or fluorine container would be considerably different?

A. I think so.

Q. In other words, the moisture in the eye, in combination with the fumes, sets up a chemical reaction that has a chemical effect upon the surface of the eye?

A. I think it is possible.

(Testimony of Dr. James R. Morrow.)

Q. And when any such reaction is set up, Nature begins to defend it immediately by causing an increased flow of tears? A. That is correct.

Q. And as long as that reaction continues, Nature continues to pour tears through the lacrimal glands, isn't that correct?

A. That is right.

Q. Wouldn't the fact that an eye watered or teared for several days after the explosion have any effect upon your conclusion that the explosion was very severe and affected the surface of the eye?

A. I should think if tears ran for several days it was evidence of an irritation, certainly.

Q. If Mr. Lubinski in this instance had tears for several days after this occurred, would that be more evidence that the occurrence was something more than a passing whiff of smoke?

A. I should think so.

Q. If following the irritation it was accompanied by some sort of swelling, conjunctivitis, swelling of the lids, would that be further evidence of the severity of the irritation? [384]

A. Well, we are dealing with two things. We are dealing with irritation and conjunctivitis. My understanding of conjunctivitis is that it is a bacterial irritation, in its ordinary sense.

Q. Let us say swelling of the eyelids; Nature put more blood there for a period of several days, or a week—call it swelling—that is further evidence of the severity of the irritation? A. Yes, sir.

Q. If, say, a month after that incident, and dur-

(Testimony of Dr. James R. Morrow.)

ing all this period of time, the eye was paining him, and the person began to have difficulty with the eye, with the vision of it, would you say there was any connection between the original injury and the beginning of difficulty with vision?

A. What injury do you mean?

Q. The injury from the irritation by the smoke bomb.

A. With the iridocyclitis?

Q. I will have the question read, and if you need any help——

(Question read.)

A. Well, it could be or it could not be.

Q. Eliminating anything that intervened, as far as we know, would you say there was a casual connection between that original incident and the beginning of difficulty with vision?

A. It could be separate, entirely.

Q. If it was separate, would you look for some other cause?

A. Certainly.

Q. And if you found no other cause, what would be your conclusion? [385]

A. Well, I wouldn't make any conclusion if I didn't find any cause.

Q. Then would you still eliminate entirely the original injury and say that had nothing to do with it?

A. I think an injury of a month's duration would be incapable of producing loss of vision. That is, had the eye been clear in the meantime.

Q. Perhaps you misunderstood my hypothetical

(Testimony of Dr. James R. Morrow.)

question. I did not say loss of vision, I said beginning to have difficulty in a period of a month.

Mr. Long: As the result of iridocyclitis, or other causes?

Mr. Levinson: I am relating this entire section of my cross examination to particular instances.

The Court: If he understands, he may answer.

Mr. Levinson: I will reframe the question.

Q. (Mr. Levinson): If we had an original explosion causing a corrosive smoke, or something that caused the lacrimal glands to function for two or three days in a row—or four days—and if we had subsequent to that some swelling—edema, I think you call it—and if about a month after the original incident he began to have difficulty with his sight, in losing vision, would you say there was any causal connection between the original injury to which I referred and the beginning of loss of vision a month later?

A. It is hard to answer that “yes” or “no,” because difficulty with vision is another subject where you would have to look for cause. [386]

Q. People sometimes go blind in one eye and don’t know it?      A. That is correct.

Q. But if a person developed the habit of walking unconsciously adjusting himself to one condition, going off to the left, that would indicate he had trouble with his right eye?

A. It could be of either eye.

Q. If there is some loss of vision?

(Testimony of Dr. James R. Morrow.)

Mr. Long: I thought counsel was indicating his loss of vision he is talking about is the result of iridocyclitis or iritis, or some other cause. There are many causes. If you are talking about iritis in relation to this patient, I have no objection whatever.

Mr. Levinson: I am not saying it was the result of iritis. I am developing this man's condition during this period of time, and I want this Doctor's opinion on it.

The Court: The objection is overruled. I would like to know if both sides agree that the witness who has just come into the court room, Mr. Tomlinson, may not be affected by the exclusion order?

Mr. Long: That is my understanding.

Mr. Levinson: I will so stipulate.

The Court: I want both sides to stipulate.

Mr. Levinson: The Libelant will so stipulate.

Mr. Long: And so do the respondents.

Q. (Mr. Levinson): Doctor, assuming that, say, in September, which is two months after the alleged injury, that Mr. Lubinski or any person was examined by a doctor, and then it was found that he had begun to develop a very severe [387] iritis and substantial loss of vision, and that prior to that date, and prior to July of 1943, he had never had any trouble with his eyes, and two months before that he had been examined for both eyes and it was found they were in good order, 20/20 in each eye; would you say, Doctor, there was any causal connection between the smoke and irritating fumes on



(Testimony of Dr. James R. Morrow.)

July 15, 1943 and the fact that he had the tears for three or four days, had the edema, had a little difficulty with his eye, and two or more months later it was discovered he had iritis, would you think there was any connection between them?

Mr. Long: Limiting it to July 15, 1943?

Mr. Levinson: Yes.

A. I would not say, because I have never seen it and never read of a case.

Q. What would be the cause of it?

A. I don't know.

Q. Assuming the man was in good health, you do not know?

A. The causes are many, and they are not always found.

Q. If I get your answer, you would not know what the cause was?

A. That is right, if I did not examine the patient or treat him.

Q. We are agreed that the causes are either exogenous or endogenous—there must be some cause?

A. That is correct.

Q. You testified on direct examination that Mr. Lubinski did not give you any history of any second fire?

A. That is correct. [388]

Q. Did you ask him about it?

A. I asked him about his history, but I had no way of asking him about a second fire, because I had no way of knowing there was a second fire.

Q. Did he seem to be cooperative?

A. Yes, sir; very cooperative.



(Testimony of Dr. James R. Morrow.)

Q. He answered freely every question you asked him?

A. That is right.

Q. What is the likelihood of any injury to his right eye, if this eye is not removed?

A. I would feel that in the future the eye should be removed.

Q. There is some danger?

A. That is right; sympathetic ophthalmia.

Q. You found nothing wrong with the right eye?

A. Except a small astigmatism.

Q. Which is a normal condition?

A. It is not normal, but it is present in most people.

Q. That is why we wear glasses?

A. That is right.

Q. A systemic condition, which is the cause of an iritis is usual throughout the body or some local point of infection in the body?

A. It is there if it is found.

Q. If it affects the eye doesn't it usually affect both eyes?

A. Not necessarily. It may or may not.

Q. Hasn't that been your common experience?

A. No. We see many more people with it in one eye than in two eyes, but if you follow that patient for a period of years, you will find it probably occurring in the other [389] eye at some time in his life, unless the cause is removed.

Q. If it is a very severe iritis, as the result of some systemic condition, wouldn't you expect to find the same condition in the other eye?

(Testimony of Dr. James R. Morrow.)

A. We do not always.

Q. What is the reason, a difference in the eyes?

A. No one knows.

Q. One eye may be a little stronger than the other, a little more resistant to the disease—that may be the answer?

A. I do not think anyone can explain why one eye suffers from the uveitis or iridocyclitis, and the other eye is unaffected at the same time.

Q. But it happens?

A. We have many patients that have it in one eye, and occasionally a patient with it in both eyes at once. But single affections are much more common than double.

Q. Would that also explain why a man exposed to fumes with both eyes only has an injury to one?

A. Your guess is as good as mine on that. I do not know.

Q. It is possible that you could have a corrosive injury to the eye, is it not, to the surface of the eye, by irritation from some gas, which would not leave a scar?

Mr. Franklin: That is objected to, if the Court please. That has been gone into.

The Court: I am going to allow him to ask the question.

A. I think corrosion would certainly leave a scar.

Q. Depending on the extent of it, would a mild corrosive leave a scar? [390]

A. Where you use the word “corrosive” I would insist that it would leave a scar.

(Testimony of Dr. James R. Morrow.)

Q. Suppose a very severe irritant?

A. An irritant might not leave a scar.

Q. The irritant at the same time would cause something on the surface of the cornea that would get inside?

A. Our eyes are subject to irritants constantly.

Q. That is right, and the fact that we keep on crying is because the irritant is still there?

A. Yes.

Q. You say this eye had a very severe uveitis, or very severe inflammation, the exodus had already covered the opening into the cornea? A. Yes.

Q. It was your opinion that while you didn't know the cause you guessed it was from frequent attacks of iritis?

A. I do not think I said that.

Q. What did you say?

A. I said he had suffered from a severe iridocyclitis or uveitis, plastic iritis.

Q. My notes say something about frequent attacks.

A. I think it is an error, because I had no knowledge of him having had frequent attacks.

Q. You do not contend it was the result of frequent attacks? A. No, sir.

Q. How long does it take an iritis to develop?

A. Overnight.

Q. It also may develop in two weeks?

A. I think iritis, truly speaking, is a very rapid thing, unless of a chronic type, with acute flare-ups, and then [391] subsides and then increases.

(Testimony of Dr. James R. Morrow.)

Q. A man may have iritis and it develops very rapidly, and he would not know it except for such things as tears or pain?

A. Well, they know it. They all hold their eyes shut and complain that they either put something in their eye—in other words, they go to the doctor because they have a physical discomfort. Many of them have pain above their brows.

Q. The only thing as far as the individual is concerned, he has physical discomfort to the eye?

A. He has a physical disability of the eye.

Q. Accompanied by discomfort?

A. That is right.

Q. And as you told me a while ago, he might lose a lot of sight and not know it?

A. That is right.

Q. The fact that he complains to a doctor is some evidence that he has trouble of some sort?

A. Yes.

Mr. Levinson: That is all.

#### Redirect Examination

By Mr. Franklin:

Q. Dr. Morrow, was the type of iritis or iridocyclitis that you found present on Mr. Lubinski's eye the rapid developing type or otherwise?

A. I couldn't answer that, because I didn't see him at the time of the development.

Q. Ordinarily, what is the usual period of development? [392]

A. The acute type, overnight.

(Testimony of Dr. James R. Morrow.)

Q. You say it stems from many systemic infections in the entire body?

A. I do not understand the question.

Q. Can it be caused by any focal infection in the body?      A. That is true.

The Court: The answer is not responsive. Can it be?

The Witness: Yes, sir.

Q. Is it medically possible to determine the specific cause of each and every infection causing an iridocyclitis?      A. No.

Q. From your examination of Mr. Lubinski's left eye, did you find any external evidence of damage to the left eye from irritants, corroding, or penetrating the left eyeball?      A. No.

Mr. Franklin: That is all.

Mr. Levinson: That is all.

The Court: Dr. Morrow, there need be no doubt but from the standpoint of both of counsel and also the Court your testimony has been quite interesting.

The Witness: Thank you, sir.

The Court: And you may be excused.

(Witness excused)

Mr. Franklin: If your Honor please, we offer in evidence the medical chart which has been marked for identification as Respondents' Exhibit A-9. [393]

Mr. Levinson: I have no objection to that as illustrative of the Doctor's testimony.

The Court: It may be admitted.

(Medical chart received in evidence as Respondents' Exhibit A-9.)

Mr. Long: I was going to suggest that there was some considerable testimony about a diagram showing the layers of the cornea, and it might be offered in evidence.

The Court: Let it be marked.

Mr. Levinson: I have no objection to it.

The Court: Then it is admitted in evidence as Respondents' Exhibit A-10.

(Diagram by Dr. Morrow received in evidence as Respondents' Exhibit A-10.)

The Court: We will take a recess at this time.  
(Recess)

---

M. W. TOMLINSON,

called as a witness on behalf of Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Franklin:

Q. Will you state your name, please?

A. M. W. Tomlinson.

Q. Where do you live, sir?

A. Mercer Island.

Q. By whom are you employed?

A. United States Coast Guard. [394]

Q. In what capacity?



(Testimony of M. W. Tomlinson.)

A. Chief Deputy United States Shipping Commissioner.

Q. How long have you held that position?

A. As Chief Deputy for about four years.

Q. Has your office the supervision of and custody of the Shipping Articles of vessels paying off in your jurisdiction?

A. Yes, sir.

Q. Did you at my request bring with you the original Articles on the voyage of the SS "George Flavel" which began effective May 17, 1943 and terminated on or about October 1, 1943, at Seattle?

A. The Articles terminated September 28, 1943, at Seattle.

Q. You have the original Articles in your possession?

A. This copy is the same as the original. It is called a duplicate. There are two original copies, as a matter of fact.

Mr. Franklin: I will ask to have this document marked for identification.

The Court: It may be so marked.

(Copy of Shipping Articles marked for identification Respondents' Exhibit A-11.)

The Court: Where is that clause that relates to the relationship of each party to the voyage?

Mr. Franklin: It shows right there, if the Court please, that the War Shipping Administration is the owner, and that the Alaska Steamship Company is the General Agent. It appears right on the face of that exhibit.

(Testimony of M. W. Tomlinson.)

The Court: I do not see the words you speak of. [395]

Mr. Franklin: I will ask to have this proposed exhibit handed to the witness, please.

Q. (By Mr. Franklin): Mr. Tomlinson, handing you what has been marked Respondents' Exhibit A-11 for identification, will you state what that is?

A. This is a copy of the face of the shipping Articles of the SS "George Flavel", for the voyage which commenced at Seattle about May 17, 1943.

Q. Who prepared that?

A. It was prepared under my supervision.

Q. Have you certified as to it being a true and correct copy? A. Yes.

Q. Is it necessary in the performance of the work of the Shipping Commissioner that the original-duplicate Articles which you brought with you be retained in the exclusive custody of the Shipping Commissioner? A. It is.

The Court: Have you any copies of that paper, or any forms from which and with which you could make copies?

Q. Is Respondents' Exhibit 11-A for identification a true full and complete copy of the original page 1 of the Shipping Articles? A. It is.

The Court: Do you have to return that to your official files, or is it agreeable to let that remain in the files of the court?

The Witness: If the witness please, that is why we made it, to bring it up here and it may stay here.

(Testimony of M. W. Tomlinson.)

The Court: You may proceed. [396]

Q. What does that show with reference to who is the operator of the vessel "George Flavel" during the voyage in question?

A. In the box in the upper left-hand corner, under the heading "Operating Company on this voyage" the name is shown "War Shipping Administration", and in parentheses, "Owner" and below that "Alaska Steamship Company, Gen. Agent".

Mr. Franklin: That is all. Thank you.

### Cross Examination

By Mr. Levinson:

Q. At the time the men sign on is anything said about the designation on top, to your knowledge?

A. It is not the practice to read that part of the agreement.

Q. As long as we have the original shipping Articles, do you have a record of Mr. Lubinski's pay-off there? A. I have.

Q. Will you read it, please?

A. Just the pay-off side?

Q. Yes, including withdrawals.

A. Mr. Lubinski was paid off at Seattle September 28, 1943.

Q. What were his total earnings at the end of the voyage?

A. 3 months and 6 days; total earnings, \$1357.44.

Q. That is three months' pay? A. Yes.

(Testimony of M. W. Tomlinson.)

Q. Did you bring with you the log book of that vessel?      A. Yes, I have the log.

Q. Did you examine the log to determine if there was any [397] reference to any fire on the ship?      A. I did.

Q. Is there any reference to any fire on the ship at all?      A. No.

Q. That is the official log?      A. Yes, sir.

Mr. Levinson: That is all.

### Redirect Examination

By Mr. Franklin:

Q. Do you know when Mr. Lubinski signed the Articles? What do those records show as to when Mr. Lubinski signed the Articles?

A. When he joined the vessel?

Q. Yes; when he signed those Articles.

A. He signed the Articles at San Francisco June 24, 1943, effective as of the 23d.

Mr. Franklin: That is all.

Mr. Levinson: I have nothing further.

Mr. Franklin: We offer in evidence what has been marked Respondents' Exhibit A-11.

The Court: Is there any objection?

Mr. Levinson: I have no objection.

The Court: The exhibit may be admitted.

(Shipping Articles received in evidence as Respondents' Exhibit A-11.)

The Court: I wish counsel would take this exhibit A-11, Mr. Levinson and Mr. Franklin, and

(Testimony of M. W. Tomlinson.)

put a red mark on the margin opposite the clause that relates to the relationship to the voyage, or the respective responsibilities [398] of the parties for the voyage, and the liabilities and duties arising in connection therewith. I do not see a word there opposite that margin.

Mr. Levinson: That is what there is.

The Court: The court has the impression, as a means of comparison, that in one case tried before this court there was introduced in evidence, or there was brought to the attention of the Court in some manner appropriate to the case, the Articles, which contained the stipulation of the parties as to the relationship that each party had to the responsibilities effected by the contract. Isn't there some clause in here that says who shall be liable for what?

Mr. Levinson: No, your Honor.

The Court: Do both sides agree there is no stipulation on that point?

Mr. Long: I would like to look at it, your Honor.

The Court: Is there any statement in the contract as to what party will be liable for injuries to the crew, or injuries and damages to the vessel, or wages of the crew, or anything of that sort? Isn't it stated who is to pay the crews' wages?

Mr. Levinson: If I may give my opinion, it is because of the contract with the vessel——

The Court: In addition to the Articles, is there any other contract between the parties?

(Testimony of M. W. Tomlinson.)

Mr. Long: I think I know what your Honor has in mind.

The Court: All right.

Mr. Long: First, the Articles, Respondents' Exhibit [399] A-11, contain in the box, alongside which the red line has been placed, the words "War Shipping Administration Owner. Alaska Steamship Company. Gen. Agent." Then the body of the document reads, "It is agreed between the master and seamen, or mariners of the Steamship 'George Flavel' of which Charles Goodwin is at present master",—and then follows the various engagement articles. In other words, this is the agreement of employment between the master and the crew. Then your Honor will recall that under the General Agency Agreement which is now in evidence as Exhibit A-1, I believe——

The Court: Will you take that contract and mark in the margin the clauses which relate to the question of liability which is sought to be enforced in this action?

Mr. Long: Yes, your Honor. And then by reference, as I said, your Honor, to Respondents' Exhibit A-3——

The Court: What exhibit do you have in your hand?

Mr. Long: Respondents' Exhibit A-3, which has been admitted in evidence. It provides, among other things, under Article 3-A, as to who the master is employed by, and by whom the seamen



(Testimony of M. W. Tomlinson.)

are employed. A-3, subparagraph D, provides as follows:

“The General Agent shall procure the master of the vessels operated hereunder, subject to the approval of the United States. The master of the ship is agent and employee of the United States, and shall have and exercise full control [400] responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the master for engagement by him, the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices,” et cetera.

“The officers and members of the crew shall be subject only to the orders of the master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.”

There are other parts of this that I cannot readily turn to, but I believe that is what your Honor has in mind.

The Court: If you think in the General Agency contract there is a clause that concerns or respects the liability and the person who is responsible for the liability here asserted in this lawsuit, will you kindly mark in the margin such clause, and let opposing counsel have a chance to approve or dis-

(Testimony of M. W. Tomlinson.)

approve of your contention that that clause does bear upon the subject.

Mr. Long: I think the clause I read, which provides the master shall be an employee of the United States, and the seamen employed by the master, of course makes the seamen employees of the United States.

The Court: Isn't there in the Agency Agreement some statement about who will be responsible for the [401] employees, their wages and their safety?

Mr. Long: I think so, your Honor, but I have seen so many of these I would not want to answer your Honor's question without looking at it.

The Court: You will have a chance to look at it before your argument. The respondents may proceed with their case in chief.

Mr. Franklin: The next is the deposition of Dr. James C. Schumacher.

The Court: How many more depositions have you?

Mr. Franklin: I think this will be the last, if the court please.

Mr. Long: I have found the portion your Honor refers to, and with counsel's permission I will mark that with red. We need not do that right now.

The Court: There seems to be a file here called U. S. Public Health Service, attached here.

Mr. Franklin: That was introduced as part of that deposition, your Honor.

(Testimony of M. W. Tomlinson.)

The Court: The deposition of Dr. James C. Schumacher?

Mr. Franklin: Yes, your Honor.

The Court: You may proceed.

(Witness excused) [402]

Mr. Long: If your Honor please, this is the deposition of Dr. James C. Schumacher, taken on behalf of respondents at San Francisco, California, Thursday, October 26, 1944, before Emma L. MacHugh, Notary Public. The Respondents were represented at the taking of the deposition by Mr. Edward R. Kay, and the Libelant by Mr. Albert Michelson. The first question appears upon line 25. upon page 2.

---

### DR. JAMES C. SCHUMACHER

called as a witness on behalf of Respondents, being first duly sworn by the Notary Public, was examined and testified by Deposition as follows:

#### Direct Examination

Q. (Mr. Kay): Dr. Schumacher, state your full name and address, please?

A. James C. Schumacher. The address you want?

Q. Yes.

A. U. S. Marine Hospital, San Francisco, California.

(Deposition of Dr. James C. Schumacher.)

Q. How long have you been at the Marine Hospital, Doctor?

A. Two and one-quarter years, approximately, a few days, more or less.

Q. And were you on duty there at the time that libelant, Mr. Walter Lubinski, presented himself for observation and treatment?

A. I was.

Q. And when did he first report there?

A. May I refer to the record?

Q. Yes. (The witness examines record.)

Mr. Levinson: If your Honor please, at [403] this point I am going to raise an objection to the testimony of this doctor on the ground of privilege. The witness reported there for treatment. He was called by the Respondents, and the witness reported to this doctor for treatment.

The Court: The Libelant reported to this doctor for treatment?

Mr. Levinson: That is right.

Mr. Long: There is nothing yet, your Honor, to object to.

Mr. Levinson: I waited until it appeared before making my objection.

Mr. Long: The objection could not be proper in any event until the doctor is asked a question as to what he found as the result of his examination as a physician and surgeon. When we get to that point then it is proper to make the objection. Thus far it is not.

(Deposition of Dr. James C. Schumacher.)

The Court: Have you any objection to the last statement?

Mr. Levinson: That is probably right.

The Court: You may proceed.

A. He first reported October 16th, 1943.

Q. Pardon me, Doctor. A. Surely.

Q. You are appearing here pursuant to subpoena duces tecum that was served on you in this matter, is that right? A. That is right.

Q. With the entire record of treatment in connection with [404] this case? A. I am.

Mr. Michelson: Can I see the subpoena?

Mr. Kay: Yes. (Handing Mr. Michelson)

Mr. Michelson: Can I ask if that was secured on an order of Court, or do you know?

Mr. Kay: I am not aware of that, Mr. Michelson, I cannot say.

Mr. Michelson: Well, it was issued out of the United States District Court for the Western District of Washington.

Mr. Kay: Northern Division.

Mr. Michelson: In Admiralty. And the subpoena was served here.

Mr. Kay: That is correct.

Q. This is your regular station, is it not, Doctor? I mean you don't have occasion to go to Seattle?

A. No, this is my regular station, permanent station.

Q. Yes. Now, when did Lubinski first present himself to the Marine Hospital?

(Deposition of Dr. James C. Schumacher.)

A. On October 16th, 1943.

Q. And did you take a history from him at that time.

A. I took a short history at that time.

Q. And what was that?

Mr. Levinson: That is where I raised my objection, your Honor .

The Court: What was the history?—is that what is called for?

Mr. Levinson: Yes, your Honor. From there on I object. Clearly that was a privileged [405] communication.

The Court: Does it have to be shown that the question would be damaging to the Libelant's case?

Mr. Levinson: The question of damage or health is absolutely immaterial. It is a question of personal privilege.

The Court: I am asking the views of both sides on that point.

Mr. Levinson: That is my view.

Mr. Franklin: My view, if the Court please, is that if the communication was received as a basis for treating or diagnosing the patient it would be embraced within the scope of the privilege.

The Court: Which diagnosis was needed for the purpose of treating him?

Mr. Franklin: Yes. I think that is true.

Mr. Levinson: I renew my objection.

Mr. Long: I do not think the objection has been definitely stated, except as to the claim of privilege. There is a proper way to state it, and



(Deposition of Dr. James C. Schumacher.)

I presume counsel wishes to do it to make the record.

Mr. Levinson: On the basis that the witness called to testify occupied the position of physician to the Libelant, and the relation of patient and physician is established, which privilege can only be waived by the Libelant. [406]

The Court: And he does not waive it?

Mr. Levinson: He does not waive it. I claim it now. I have all my rights under the rules reserved to the time the deposition is read.

Mr. Long: Under the Statute of California the patient must claim it himself.

Mr. Levinson: We are not under the California law.

Mr. Long: That is where the relationship of patient and physician arose.

The Court: I do not think that we are trying this case according to the California law. We are not in California, and there is nothing that I know of that is applicable to California. If that is the counter objection it is overruled.

Mr. Long: It is my duty, inasmuch as it now appears that the relationship existed in California. I know counsel wishes to claim privilege, and I am trying to suggest the proper way to do it.

The Court: Very well. The claim of privilege is sustained.

Mr. Franklin: If the Court please, Respondents offer to prove by the testimony of Dr. Schumacher

(Deposition of Dr. James C. Schumacher.)

that if he were asked the following questions he would make thereto the following answers, and with the indulgence of the Court I want to read the [407] balance of the deposition.

The Court: All of it?

Mr. Franklin: Yes, your Honor, except the objections, and except the colloquy.

The Court: Do you feel that is necessary to properly preserve your record?

Mr. Franklin: Yes, your Honor.

The Court: All right. You will be given that opportunity.

Mr. Long: May I suggest, so that the Court may understand our situation, this physician is a public official, an officer of the United States Marine Hospital, an employee of the United States, the same as this man is.

The Court: Do you wish to show the Court some authority that you would like to call to your assistance in defense of your position?

Mr. Long: I think the question is still moot, and I think the weight of authority is according to your Honor's ruling at the present time. Nevertheless, we wish to make the record, to be frank about it.

The Court: I am sure counsel on both sides understand that I would like to have the benefit of any authority available on any important point, and any time counsel will let me know that they have some authority they would like to have the Court [408] consider I am always glad to welcome any such sug-

(Deposition of Dr. James C. Schumacher.)

gestion. You may proceed to make your record. The court will provide that time and opportunity at this time.

Q. And what was that?

Mr. Michelson: Just a minute. Is he testifying from his own memory or is he testifying from papers which I see he has on the desk before him?

Mr. Kay: Well, he is referring to those records. That is what you wish to do, is it, Doctor?

A. Yes.

Q. (Mr. Michelson): What are the records?

A. The record—there are two of them. One is the out-patient record, and his other is his record in the hospital.

Q. A clinical record? A. A clinical record.

Mr. Michelson: Well, inasmuch as the Doctor is not testifying from his own independent recollection and is apparently relying on the record, I will object to him being questioned regarding it, that the record is the best evidence of what it contains, and that it should be introduced in evidence.

Mr. Kay: Well, the record is going to be introduced in evidence, we intend to do that. And aside from that record, we have some other questions that we want to ask the Doctor. So you have made your objection, and we will proceed.

Mr. Michelson: Yes. It can be understood that all this testimony which he is now giving is from the [409] record, and that we object to it being given in that way, since he has no independent recollection.

(Deposition of Dr. James C. Schumacher.)

Mr. Kay: This particular question which I have asked and which he is answering is——

A. I can testify without the record, but I won't remember the dates accurately, that is the only thing.

Mr. Kay: All right.

Q. You have referred to the record and you say that was October 16th, 1943, is that right?

A. Yes.

Q. Well, aside from the record what is your recollection as to the history that he gave you?

A. Well, the history which I took was that some time in September, about, the patient was a little bit uncertain about it, but he said about September 7th, 1943, he was exposed to smoke and dust from the ship which caused an inflammation of his eye, his left eye.

Q. Did he give you any different history than that at any subsequent time?

A. I know that he gave a different history to the interne with regard to the date when he was admitted to the hospital.

The Court: I do not want to hear this testimony. Couldn't it be stipulated between counsel that it may be regarded that this deposition, all of these questions and answers, was offered and the objection to it was made on the basis previously stated, and the court sustained the objection?

Mr. Long: I think we will have to read it. [410] When this deposition was taken there was no claim of privilege made.

(Deposition of Dr. James C. Schumacher.)

The Court: I do not want to hear the testimony.

Mr. Long: I think we have to make our offer before your Honor. I do not know any other way to do it. Frankly, I do not. I realize it takes time.

The Court: I can imagine that some human mind might be influenced by hearing it.

Mr. Long: I know of no other way, if your Honor please, than to make the offer in open court, before the court, and I think that is the only way we can do it to preserve our record.

The Court: I do not think my own mind will be influenced, but there is another reason, and that is because it will take some time to hear it, and I do not want to go through the labor of it, since it is something that the court has already resolved not to consider in this case. But you may proceed, if you cannot agree upon it.

Mr. Long: I do not think that we can do it by stipulation or I would be glad to do it.

The Court: Very well. Proceed.

Q. (Mr. Kay): Well, how do you know that, Doctor?

A. I know from having looked at the record after he was admitted to the hospital. He was my patient and I had to read the record. [411]

Q. And what did you find?

Mr. Michelson: Just a minute. I object to it. The record itself is the best evidence.

Q. (Mr. Kay): Well, you say that he gave a different date after he first gave the history to the interne? A. Yes, he did.

(Deposition of Dr. James C. Schumacher.)

Q. How do you know that?

A. I know it by reading the record.

Q. And does the record show that?

A. The record shows.

Mr. Michelson: Just a minute. I object to it. The record is the best evidence.

Q. (Mr. Kay): What different date did he give to the interne so far as the records are concerned?

Mr. Michelson: Just a minute. The same objection.

Mr. Kay: You can answer the question.

A. He said that some time in about the middle of August. I don't know the exact date that he gave in August, but I know he changed the date to some time in August.

Q. And is that indicated on that out-patient card?

Mr. Michelson: Mr. Kay, I don't want to raise the same objection. Anything that is in the record, I object to him being questioned on it.

Mr. Kay: It is understood that your objections will go to any questions of that nature. I mean they are reserved for the time of trial.

Q. Will you refer to that card, then, and indicate where the change was made?

Mr. Michelson: Just a minute. I object to it because that is not in evidence, and I haven't seen it, [412] either, for that matter.

Mr. Kay: Well, I will let you see it. (Handing Mr. Michelson.)



(Deposition of Dr. James C. Schumacher.)

Mr. Michelson: Thank you. (Examining document.)

Q. (Mr. Kay): You are referring here to—what card do you call this?

A. This is the out-patient record.

Q. Will you please read the history that is shown there, which I presume is in your handwriting, is it?

A. This is in my handwriting. This is the one I took.

Q. All right, if you will read that?

A. "Patient had iritis of the left eye about August, 1943." I will give you the original date. I am sorry. "Patient had iritis of the left eye about September 7th while in Alaska." This is the report. In parenthesis I have, "Report by Navy Doctor." Then a new sentence: "Patient never wore glasses, and he has no pain."

Q. Then that is in ink, is it, and I see that Sept. 7th has a line drawn through in pencil, and above that written in pencil "Aug. 1943." Was that put there by you?

A. No, I didn't put that there.

Q. And that was the matter that you were referring to that was changed by presumably the interne?

A. No. The history which the patient gave to the interne on the history sheet of the record is somewhat different as to dates.

Q. Oh. But that pencil correction there is not your handwriting?

A. No, that is not my handwriting.

(Deposition of Dr. James C. Schumacher.)

Q. Now, on this out-patient card is there a diagnosis [413] indicated? A. Yes, there is.

Q. What does that read?

A. "Chronic iridocyclitis of left eye."

Q. Was that your diagnosis, Doctor?

A. That was my diagnosis, yês, sir.

Q. Now, independently of that record there, do you recall making that diagnosis yourself?

A. Yes, I did.

Q. And how long was this patient under your care there, for what period or periods?

A. Let's see. By memory or by the chart?

Q. By your recollection or the chart?

A. Well, I will give you the exact dates from the chart.

Q. (Mr. Michelson): You are reading from the record, Doctor?

A. This is the exact date. He was under our care and observation from October 16th, 1943, until February 9th, 1944.

Q. (Mr. Kay): And did you generally see him most of the time?

A. Yes, I saw him all but twice during that time.

Q. And who else would see him other than you?

A. Dr. Faed in the clinic saw him twice when I wasn't there. I am sorry. Saw him once when I wasn't there. I saw him every other time. Dr. Percy Faed saw him once. I was apparently doing something else and did not get to see him.

Q. Well, there is another report here referred to as "Clinical record." (Handing Mr. Michelson.)

(Deposition of Dr. James C. Schumacher.)

Q. Under "Diagnosis" you have "Iritis chronic left eye." And this report is signed by you, is that correct? A. Yes. [414]

Q. Now, will you tell us what difference, if any, there is in the two terms, iritis and iridocyclitis?

A. Well, the term iridocyclitis implies a more widespread infection than iritis, but it is practically impossible to have one without the other.

Q. I see. Now, Doctor, what is your opinion as to whether exposure to smoke in July and again in August, 1943, that is, whether or not there is any relationship between the condition which you diagnosed and such exposures?

Mr. Michelson: Just a minute. I object to that upon the ground that I understand there is a regulation of the public—United States Public Health Service—prohibiting doctors in that Service from giving an opinion on a matter coming under their case. I would like to ask the doctor the question if he knows of such a regulation.

A. No, we are permitted to give testimony as long as we have the permission of the Commanding Officer, but we are supposedly—it is supposed to be expert testimony at that time.

Q. Did you secure the permission of the Commanding Officer?

A. Yes, I have his permission to be here.

Q. (Mr. Kay): Have you my question in mind, Doctor?

A. Will you please repeat it?

(Question read by the reporter.)

(Deposition of Dr. James C. Schumacher.)

A. In my opinion, there is no relationship between the exposure to the smoke and the condition for which I treated him.

Q. And will you explain why you have that opinion, Doctor?

A. Well, iritis or iridocyclitis is an inflammation of the deeper tissues of the eye, and there are a limited number of things which cause it. The most common cause is some endogenous toxin, either a toxin as such, or a toxin from [415] a disease, such as syphilis, tuberculosis, gonorrhea, or you can also get it from injuries; but the injuries which do cause it have to be of a very severe nature, either a penetrating type of injury, or a very severe contusion of the eye are about the only things which will cause it.

Q. Was there any history on the part of the patient, or from any other source that he had any such injuries which would be likely to cause or aggravate the condition of iritis or iridocyclitis?

A. From the history that the patient gave me there was none.

Q. Now, Doctor, there is a report in your records here under the heading of "Special Examination and Treatment Request, U. S. Naval Hospital," and it contains the signature of H. A. Kaven (M.C.) U.S.N. Where did you secure that report?

A. The patient brought that with him.

Q. The patient brought that with him. And what did he indicate that that was, or where he got it?

A. He told me that he got this from the Naval Officer who examined him in Alaska.

(Deposition of Dr. James C. Schumacher.)

Q. And would you read that into the record, the report?

Mr. Michelson: Well, I thought you said you were going to introduce these?

Mr. Kay: I am, but in the event there is some other objection I want the Doctor's testimony on it, anyway. I am going to ask him a question about this particular report.

Mr. Michelson: It is objected to that it is not the best evidence. This is not in evidence, and if he is going [416] to read it, it is not really his own testimony.

Mr. Kay: Yes, but I am going to ask him a question with reference to the description of the condition there. Will you read that, Doctor?

A. (Reading): "P.X. Left eye.  
Tactile tension soft."

Then the next paragraph is:

"Cornea-keratitic deposits on  
posterior cornea surface, lower  
1/2. Iris appears muddy."

Then below that is another paragraph:

"R.X. 1% atropine sulphate  
sol. Drops 1 tid."

Another paragraph:

"Hot compresses 20 min bid."

Q. What does "bid." mean?

A. That means twice a day.

(Deposition of Dr. James C. Schumacher.)

The Court: The court will now be adjourned until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until January 12, 1945, at the hour of 10:00 o'clock a.m.) [417]

---

January 12, 1945, 10:00 O'Clock A.M.

The Court: You may proceed with the case on trial.

Mr. Long: We will continue reading at line 9 on page 12.

Mr. Levinson: In order that the record may be clear, as I understand it this is still a continuation of the offer of proof.

Mr. Long: Of the offer of proof.

Mr. Levinson: The offer that was made yesterday.

The Court: That is my understanding.

Mr. Long: That is correct.

Mr. Levinson: It would appear to me, in the interests of the convenience of the court, as well as orderly procedure, that an offer of proof should be made in the form of an offer of proof, rather than simply reading the questions and answers in a deposition. It appears to me that counsel should be able to summarize what he expects his witness to prove, and make such an offer to your Honor, and at least put your Honor in a position to know whether it should be admitted, rather than having to pass upon



(Deposition of Dr. James C. Schumacher.)

so many collateral matters as appear in the taking of a deposition. I think in all fairness to your Honor an offer of proof in the form of an offer of proof should be made, and then your Honor could consider whether the offer should be accepted.

The Court: I think that is the way it is ordinarily done. I also think that in the interests of conserving the [418] time of counsel as well as the court it should be done in that form, if convenient to counsel.

Mr. Long: If the Court please, we are virtually through. I merely suggest that it would be necessary to possibly take the same time in formulating an offer of proof, chronologically, as it would to complete the reading of the deposition. We are at page 12 right now.

The Court: In view of that last statement I will approve your proceeding in that form, but I would suggest to both sides that in the future I wish you would try to conserve your time by making an offer of proof in summarized form.

Mr. Long: May I suggest that that portion of the deposition beginning on page 13 is not subject to the objection. I think it is proper testimony.

The Court: When you get to it will you call the attention of opposing counsel to it, and then there will be an opportunity given to both of you to consider it together?

Mr. Long: Yes, your Honor.

The Court: You may proceed.

(Continuing reading.)

(Deposition of Dr. James C. Schumacher.)

Q. This description that you have read of the condition of the eye, state whether or not that is a typical symptom of the condition which you eventually found?

A. The description which appears here is a typical description of iritis.

Q. Yes.           A. Or iridocyclitis.

Q. And how about the treatment, is that standard treatment [419] that the Doctor indicated there for that type of condition?

A. The treatment indicated is standard for iritis or iridocyclitis.

Mr. Long: I think, if the Court please, the following testimony, beginning at line 19 on page 12, and concluding on page 14, line 23, is probably not objectionable as being privileged.

The Court: Are you prepared at this time to respond?

Mr. Levinson: I would suggest that he read it, your Honor, and then I can raise the question to the admission. It relates to the identification of the hospital records, which is in a different situation than the testimony of the doctor. I am frank to admit that.

Mr. Long: Those hospital records, if the Court please, the certificate of hospital out-patient treatment and the clinical record, have been admitted in evidence and are exhibits in this case.

Mr. Levinson: That is true.

Q. (Continuing reading): Now, I see in the rec-

(Deposition of Dr. James C. Schumacher.)

ord copies of Certificate of Hospital and Outpatient Treatment, and Abstract from Clinical Record, both indicating that the originals had been sent to the patient, is that correct?

Mr. Michelson: That is objected to as leading. If he sent it himself, of course—— [420]

Q. (By Mr. Kay): Will you state whether or not the Clinical Abstract and Certificate of Hospital and Out-patient Treatment were sent to the patient by you, or under your direction?

A. I cannot truthfully answer that. I mean I am not sure.

Mr. Levinson: Your Honor, I have never seen the records, and I wonder if I could see them. There was something more came with them, and I would like to make an examination.

The Court: Mr. Levinson, will you point them out? I do not know whether the clerk knows what you refer to.

Mr. Levinson: I have never seen it and I would like to look at it.

Mr. Long: For the purpose of identification in the record, I would like the record to show that counsel is now examining the entire hospital record of Mr. Walter Lubinski, in the United States Marine Hospital at San Francisco, while under the care of Dr. Schumacher, which Dr. schumacher refers to and which is made a part of the exhibit to the deposition of Dr. Schumacher. I want the record to show that counsel is now examining it.

(Deposition of Dr. James C. Schumacher.)

The Court: The statement just made by counsel is received in the record. (Counsel examines document.) You may proceed. Are you still reading that part which he is going [421] to be asked about, and in connection with a desire to offer it?

Mr. Levinson: I so understand.

Mr. Long: Yes. Reading, Mr. Levinson, at line 4, page 13.

Q. (Continuing reading): Are these documents I show you copies of Certificate of Hospital and Out-patient Treatment and Clinical Abstract? I see they are carbon copies.

A. Yes, they are copies. I just want to be sure. The out-patient discharge from the hospital, date of admission—Yes, this is the Clinical Abstract.

Q. Will you read what is stated above this Abstract and Clinical Record, please?

A. "Mailed to: Walter C. Lubinski, 1602 Northern Life Tower, Seattle, Washington."

Q. And above this Certificate of Hospital and Outpatient Treatment?

A. "Given to patient."

Mr. Kay: All right, I think that is all.

Examination by Mr. Michelson:

Q. (Mr. Michelson): Doctor, what is your age?

A. 34.

Q. Now, that Clinical Record, so-called, that is an abstract from the Clinical Record? A. Yes.

Q. That is an abstract from the Clinical Record itself, is it? A. Yes.

(Deposition of Dr. James C. Schumacher.)

Q. And it is only a very brief abstract from the record? A. Yes. [422]

Q. Who makes that up, do you know?

A. We have a girl who does nothing but that up there. We have a lot of them and she abstracts them, and it has to be O.K'd by the Commanding Officer.

Q. She isn't a doctor herself? A. No.

Q. And she just gets it from the record?

A. Yes, she is a medical secretary.

Q. A medical secretary. There are a great many of those gotten every day, aren't there?

A. Oh, five or six at least. That would be a guess.

Q. And, now, the Certificate of Outpatient—Hospital and Outpatient Treatment, that is made up by her, too? A. By her also.

Q. And you don't know whether those were sent out, or how they happen to be in that file, do you?

A. Yes, I know how they happen to be in the file. Those had to be O. K'd by—the Clinical—what we call the Insurance Form, which is a smaller Clinical Abstract has to be O. K'd by me. I have to read it over before it is turned over to the patient, or whomever he wants. But they bring it to my office. I O. K. it if the contents of it is correct. But the copies go—I can't swear to that.

Q. Now, Doctor, was Mr. Lubinski under your care from approximately October 16th, 1943, to February 9th, 1944? A. He was.

(Deposition of Dr. James C. Schumacher.)

Q. You treated him, did you?

A. I did, sir.

Mr. Levinson: I think thereafter begins [423] matter which might be objected to under the claim of privilege.

The Court: Is there any objection to receiving in evidence that part which counsel has just read, beginning at page 12, line 19, and continuing to page 14, line 24?

Mr. Levinson: I have none.

The Court: That part is now received in evidence.

Mr. Levinson: As a matter of fact, I do not believe that the following comes within my objection, either. It simply relates to treatment—if counsel wants it.

Mr. Long: If counsel waives his objection to that part, let us read it.

The Court: Very well.

Mr. Long: Then beginning at line 25 on page 14.

The Court: The following is now received in evidence.

Mr. Levinson: Very well.

(Continued reading)

Q. Did you tell him what to do about his eye, and what he should not do? A. Yes, sir.

Q. Do you remember what you told him?

A. Well, at the time he left the hospital I gave him atropine to use in his eye daily, told him he could use compresses on his eye, if he had the time



(Deposition of Dr. James C. Schumacher.)

it would be advisable; [424] and that is about all he could do by himself.

Q. But each day that he would come out there—

A. Each day he came out I treated the eye and told him what to do.

Q. And advised him? A. Yes, sir.

Q. And he consulted you about it?

A. Yes, sir.

Q. Asked you what to do. Now, regarding that change in lead pencil that you referred to, you didn't make that change, did you?

A. No, I did not.

Q. You were not present when it was made, were you? A. I was not.

Q. You were not present at any conversation on which that date was mentioned between Mr. Lubinski and another doctor, or other person who wrote that? A. No.

Q. So all you know is it is on the record?

A. All I know is that it has been changed, yes. Mr. Michelson: That is all.

Mr. Long: The redirect examination, I do not think that is privileged, either.

Mr. Levinson: No.

The Court: You may proceed.

(Continuing reading)

### Redirect Examination

Q. (Mr. Kay): Doctor, of what school are you a graduate? A. St. Louis University.

(Deposition of Dr. James C. Schumacher.)

Q. And besides your experience at the Marine Hospital, what [425] have you done?

A. Well, I graduated in 1936 and had an internship at the Marine Hospital in Baltimore for one year, was in general practice for a year, and then went to the Marine Hospital in New Orleans, where I was in the Eye Department for approximately three years.

Q. Are you specializing in the treatment of eye conditions, then?      A. Yes.

Q. And you have been for some five years?

A. Yes, longer than that, even. Following that I was with the Professor of Ophthalmology at St. Louis University for one year, and then came out here to do eye work. They sent me out here for that purpose, to do the eye work.

The Court: That completes the part the court ordered received in evidence.

Mr. Franklin: May we make the record? That terminates at line 11 on page 16.

The Court: You may do so.

Mr. Levinson: The following few questions relate to the matter of privilege, on which objection I am still standing, and I assume counsel will want to read that as part of the offer of proof.

The Court: He may make his offer. The Court has sustained the objection to it heretofore.

Mr. Franklin: The Respondents offer to prove that if asked the following question, the witness would make the following answer: [426]

(Deposition of Dr. James C. Schumacher.)

Q. Assuming these exposures to smoke caused some inflammation of the eyelids and irritation of the eyes, as smoke would state whether in your opinion that exposure and those resulting conditions caused or aggravated the present condition of iridocyclitis?

A. Well, the inflammation of the lids or the irritation of the eye caused by the smoke, in my opinion, would not cause the iritis or the iridocyclitis or aggravate the condition that was present before.

Mr. Franklin: The next matter, if the Court please, is not objectionable. That is line 23 to line 25, on page 16.

The Court: Have you any objection to that, Mr. Levinson?

Mr. Levinson: I have none, your Honor.

The Court: That matter is now received in evidence, and you may read it.

(Continuing reading).

#### Recross Examination

Q. (Mr. Michelson) In what State were you licensed to practice?

A. I was licensed to practice in Missouri and also Texas, and I am licensed to practice in California.

Mr. Michelson: That is all.

Mr. Franklin: Then lines 1 to 5, on page 17, I think are not privileged.

Mr. Levinson: I agree with that.

The Court: They are received in evidence.

(Continuing reading)

(Deposition of Dr. James C. Schumacher.)

Mr. Kay: Now, Doctor, we are going to offer this [427] Clinical Record in evidence, and we will ask the Court it be withdrawn when this case is terminated. Is that all right?

A. That is all right. You can have it just as long as you want providing I have a receipt.

Mr. Levinson: Is that the offer now, Counsel, for the record?

Mr. Long. We are now offering the Clinical Record.

The Court: Has it been marked?

Mr. Franklin: No, if the Court please.

The Court: Have you any suggestion as to a proper mark or number?

Mr. Franklin: I think our next number is Respondents' Exhibit A-12.

The Court: It may be marked for identification as Respondents' Exhibit A-12.

(Document marked for identification Respondents' Exhibit A-12.)

Do you wish to include in that marked exhibit this sheet which was taken out of the exhibit previously?

Mr. Franklin: Yes, your Honor. I want to subsequently offer that as a separate exhibit.

The Court: I had understood that you wanted it included in this exhibit.

Mr. Franklin: No, your Honor: I want to withdraw that from the abstract and make a separate exhibit of it.

The Court: Do you now offer Respondents' Exhibit A-12?

Mr. Franklin: Yes, if the Court please. [428]

Mr. Levinson: I have no objection.

The Court: It may be admitted.

(Document received in evidence as Respondents' Exhibit A-12.)

Now do you wish to mark that sheet of paper which was taken out of it?

Mr. Franklin: Yes, your Honor, as Respondents' Exhibit A-13 for identification.

The Court: Let it be so marked.

(Document marked for identification Respondents' Exhibit A-13.)

Mr. Franklin: Mr. Levinson, there is no dispute that Respondents' Exhibit for identification A-13 was signed under oath by Mr. Lubinski?

Mr. Levinson: It appears on the face of it.

Mr. Franklin: And that that application was made by Mr. Lubinski for the purpose of procuring an abstract from the clinical record which has heretofore been introduced in evidence?

Mr. Levinson: That is right.

Mr. Franklin: If the Court please, we offer in evidence at this time Respondents' Exhibit A-13 for identification.

Mr. Levinson: I do not see it materiality. It is simply an application for an abstract of the record.

Mr. Franklin: It shows the circumstances and explains the mechanism whereby an abstract is obtained.

Mr. Levinson: I do not see its materiality.

The Court: The objection is overruled. Respondents' Exhibit A-13 is now admitted. [429]

(Document received in evidence as Respondents' Exhibit A-13.)

### RESPONDENTS' EXHIBIT A-13

Sent to U. S. Marine Hospital, Seattle by error.

#### APPLICATION FOR ABSTRACT FROM CLINICAL RECORD

3-13-44

Miss Kenney

Feb. 29, 1943

Medical Officer in Charge.

U. S. Public Health Service

.....

San Francisco, Calif.

Sir:

Please forward to me at the address given below, an abstract from the clinical record of my case while I was a patient of the U. S. Public Health Service at the U. S. Marine Hospital, San Francisco, Calif., on account of disability which occurred while I was employed on the S. S. George Flavel, which vessel is operated by Alaska S S Co.

I was admitted for treatment Oct. 18, 1943 and was discharged O. P. Feb. 15 1944.



The purpose for which I desire the information is as follows: Adjustment of Claim for Compensation.

Respectfully,

W. C. LUBINSKI

(Signature of applicant)

1602 Northern Life Tower, Seattle, Wash.

Subscribed and sworn to before me this 29 day of Feb., 1944.

[Seal] SAM L. LEVINSON

(Signature of Notary Public)

Note: The applicant is notified that to avoid partisanship, the United States may, upon receipt of proper application, furnish the foregoing information to any party in interest, whether such information is desired for the purpose of litigation or otherwise.

---

Mr. Franklin: If the Court please, I would like to make my argument as to the fact that the privilege in this case has been waived.

The Court: You may proceed with that at this time in connection with your offer of all of the parts of Dr. Schumacher's deposition which have not already been admitted in evidence and received as a part of the Respondents' case by the court.

Mr. Franklin: If the Court please, the right of a patient to seal the lips of his attending physician

is not a common law right. It is a statutory right. It is a right that has been much discredited in recent years. It is a right that can be waived by any disclosure of any of the information which has been obtained by virtue of the physician-patient relationship, because when the patient discloses any portion of the treatment or disease for which a physician treated him he thereby waives the privilege, because the reason for the privilege, which is incident upon the necessity of a patient having the utmost confidence in his physician, and such revelations as he may make to him for the purpose of effecting a cure, no longer hold.

So that the law is well settled, if the court please, that if there is a waiver or a communication in the presence of third parties of any contents of any information which a physician has gained by virtue of that relationship, there exists a waiver.

In this case it is quite apparent, if the court [430] please, that there has been a waiver of the testimony of Dr. Schumacher.

If your Honor will refer to Respondents' Exhibit A-13, which has just been introduced in evidence, you will observe on the lower portion of that exhibit, if the Court please, a statement thereon—in the extreme lower portion of that affidavit, in the lower left-hand margin—you will observe that there is a statement advising Mr. Lubinski, in this case the patient, that when he made that application for that abstract of clinical record that information would be divulged to all interested parties. I think

that is a fair summation of that statement at the bottom of the record.

So that when Mr. Lubinski applied for that abstract he waived his privilege. Not only did he waive his privilege by applying for the abstract itself, and being forewarned of what his application would entail as to disclosure, but when he comes into court and offers in evidence Libelant's Exhibit No. 1, an abstract of clinical record of his treatment and his disease, and his condition, that amounts to a further waiver and disclosure of the information obtained by Dr. Schumacher, the attending physician.

So we have here, if the court please, a waiver of the information by the Libelant, by specifically introducing in evidence the results of the treatment, and the opinion of the attending physician as to the disease and ailment from which he is suffering.

We have a further waiver, if the Court please, by reason of respondents' Exhibit A-2, which was admitted [431] by counsel to have been furnished by Mr. Lubinski to Mr. John Black, who was conducting certain negotiations in this matter prior to the institution of this lawsuit. There we have a second instance where the information was disclosed.

The Court: May I see Respondents' Exhibit A-2?

Mr. Franklin: Yes, your Honor, and here is Libelant's Exhibit 1. Your Honor will recall the unobjected to testimony of Dr. Schumacher that he personally checked those records to make sure that the information was accurate, and the history

and diagnosis and treatment recorded in those two exhibits was correct.

The Court: What is there on Respondents' Exhibit A-2 that you think is a waiver of the privilege?

Mr. Franklin: The history is a waiver of the privilege. "The patient states he had iritis of the left eye about August, 1943, while in Alaska." Diagnosis is a waiver of the privilege.

The Court: How can you say that when he might not have been willing to tell me or you that, but he claims he was willing to tell Dr. Schumacher that?

Mr. Franklin: Yes, your Honor, but our position is that this information has been disclosed to third parties and, therefore, the privilege is waived.

The Court: Who, and under what circumstances?

Mr. Franklin: First, by applying for the abstract of clinical record, which indicated a knowledge on his part that he would thereby waive that privilege by disclosing this information to interested parties, other than himself. That was the first step.

The Court: Have you a case on that?

Mr. Franklin: I have no case, your Honor. It shows it right on the abstract.

The Court: What is your motion with respect to these two instruments, Exhibits 1 and 2? What is it you are asking for? What is your application?

Mr. Franklin: I am contending, if the Court please——

The Court: No; I want to know specifically what you are asking the Court to do.

Mr. Franklin: I ask the Court to admit in evi-

dence that portion of the deposition of Dr. Schumacher which your Honor has read in our offer of proof, for the reason that the privilege has been waived in this case.

Mr. Levinson: Before your Honor rules on it, perhaps this might help us——

The Court: Do you have any objection to the request?

Mr. Levinson: I think that this will answer your Honor's question. There has been a serious question in my mind this morning as to the so-called waiver, and because of the way it was presented to the Court, actually read to the Court, I withdraw my objection on the waiver.

The Court: Very well. The application is granted. Now is there anything that you ask the Court to do in this connection that has not yet been done, or in respect to which the court has not made a ruling?

Mr. Long: I think not, your Honor. It is my understanding, if I may state it in the record, that there are other procedural matters to be considered.

The Court: Respondents' Exhibit A-13 has been [433] received in evidence, and Respondents' Exhibit A-2 you now have. That is already received in evidence. Now do you think of anything else that has not been ruled upon?

Mr. Long: No, your Honor, but I want to be certain the record is clear. It appears from the record that the claim of privilege in connection with all of the testimony of Dr. Schumacher has now been waived.



Mr. Levinson: That is correct.

Mr. Long: And the Court may consider it as evidence in this case.

Mr. Levinson: Yes.

The Court: And the Court does now receive in evidence as part of the Respondents' case in chief all of the deposition of Dr. James C. Schumacher.

Mr. Long: I think as a procedural matter, your Honor, so that the record may be clear, it is probably incumbent upon us to read a portion again to your Honor of Dr. Schumacher's testimony.

The Court: You may do so if you wish.

Mr. Long: I do not like to take the time, but I want to be clear about that.

The Court: You may do so if you wish.

Mr. Long: It is a technical part of our procedure.

The Court: I want to say, gentlemen, that I am going to suspend the trial of this case at noon. I have so many things to do that I will suspend the case on trial of this and all other cases at noon.

Mr. Long: May I speak to counsel off the record?

The Court: You may do so. [434]

(Discussion off the record.)

Mr. Long: We will be through in a matter of a few minutes, your Honor. As long as this testimony of Dr. Schumacher is concluded I feel that we should, in the proper procedure, read the testimony to your Honor, that portion to which objection has been withdrawn.

The Court: The Court has no disposition to disagree with counsel's judgment in the matter, or



make any unfavorable comments to counsel's contention. I just wish at this time to remind counsel on both sides of the court's limitation of time.

Mr. Long: Mr. Franklin says this is our last witness.

Mr. Franklin: At page 2, line 5.

Mr. Long: Part of this has been introduced without objection. My recollection is that to line 14, page 5, everything went in without objection.

Mr. Franklin: Yes; that is right.

Mr. Long: If that can be agreed, with the permission of the Court.

The Court: That is approved by the Court.

Mr. Long: Page 5 line 18.

---

DR. JAMES C. SCHUMACHER

(Continued reading of deposition)

Q. (Mr. Kay): You have referred to the record and you say that was October 16th, 1943, is that right? A. Yes.

Q. Well, aside from the record what is your recollection as to the history that he gave you? [435]

A. Well, the history which I took was that sometime in September, about, the patient was a little bit uncertain about it, but he said about September 7th, 1943, he was exposed to smoke and dust from the ship which caused an inflammation of his eye, his left eye.

Q. Did he give you any different history than that at any subsequent time?

(Deposition of Dr. James C. Schumacher.)

A. I know that he gave a different history to the interne with regard to the date when he was admitted to the hospital.

Mr. Michelson: I object unless he testifies what he himself knows.

Q. (Mr. Kay): Well, how do you know that, Doctor?

A. I know from having looked at the record after he was admitted to the hospital. He was my patient and I had to read the record.

Q. And what did you find?

Mr. Michelson: Just a minute. I object to it. The record itself is the best evidence.

Q. (Mr. Kay): Well, you say that he gave a different date after he first gave the history to the interne? A. Yes, he did.

Q. How do you know that?

A. I know it by reading the record.

Q. And does the record show that?

A. The record shows.

Mr. Michelson: Just a minute. I object to it. The record is the best evidence.

Q. (Mr. Kay): What different date did he give to the interne so far as the records are concerned? [436]

Mr. Michelson: Just a minute. The same objection.

Mr. Kay: You can answer the question.

A. He said that sometime in about the middle of August. I don't know the exact date that he gave

(Deposition of Dr. James C. Schumacher.)

in August, but I know he changed the date to some-time in August.

Q. And is that indicated on that out-patient card?

Mr. Michelson: Mr. Kay, I don't want to raise the same objection. Anything that is in the record, I object to him being questioned on it.

Mr. Kay: It is understood that your objections will go to any questions of that nature. I mean they are reserved for the time of trial.

Q. Will you refer to that card, then, and indicate where the change was made?

Mr. Franklin: The next is line 17.

Q. What card do you call this?

A. This is the out-patient record.

Q. Will you please read the history that is shown there, which I presume is in your handwriting, is it?

A. This is my handwriting. This is the one I took.

Q. All right, if you will read that?

A. "Patient had iritis of the left eye about August, 1943." I will give you the original date. I am sorry. "Patient had iritis of the left eye about September 7th while in Alaska." This is the report. In parenthesis I have "Report by Navy Doctor." Then a new sentence: "Patient never wore glasses, and he has no pain."

Q. Then that is in ink, is it, and I see that Sept. 7th has a line drawn through in pencil, and above that written [437] in pencil "Aug. 1943." Was that put there by you?

(Deposition of Dr. James C. Schumacher.)

A. No, I didn't put that there.

Q. And that was the matter that you were referring to that was changed by presumably the interne?

A. No. The history which the patient gave to the interne on the history sheet of the record is somewhat different as to dates.

Q. Oh. But that pencil correction there is not your handwriting?

A. No, that is not my handwriting.

Q. Now, on this out-patient card is there a diagnosis indicated? A. Yes, there is.

Q. What does that read?

A. "Chronic iridocyclitis of left eye."

Q. Was that your diagnosis, Doctor?

A. That was my diagnosis, yes, sir.

Q. Now, independently of that record there, do you recall making that diagnosis yourself?

A. Yes, I did.

Q. And how long was this patient under your care there, for what period or periods?

A. Let's see. By memory or by the chart?

Q. By your recollection or the chart?

A. Well, I will give you the exact dates from the chart.

Q. (By Mr. Michelson): You are reading from the record, Doctor?

A. This is the exact date. He was under our care and observation from October 16th, 1943, until February 9th, 1944. [438]

(Deposition of Dr. James C. Schumacher.)

Q. (Mr. Kay): And did you generally see him most of the time?

A. Yes, I saw him all but twice during that time.

Q. And who else would see him other than you?

A. Dr. Faed in the clinic saw him twice when I wasn't there. I am sorry. Saw him once when I wasn't there. I saw him every other time. Dr. Percy Faed saw him once. I apparently was doing something else and did not get to see him.

Q. Well, there is another report here referred to as "Clinical record." (Handing Mr. Michelson.)

Q. Under "Diagnosis" you have "Iritis chronic left eye." And this report is signed by you, is that correct? A. Yes.

Q. Now, will you tell us what difference, if any, there is in the two terms, iritis and iridocyclitis?

A. Well, the term iridocyclitis implies a more widespread infection than iritis, but it is practically impossible to have one without the other.

Q. I see. Now, Doctor, what is your opinion as to whether exposure to smoke in July and again in August, 1943, that is, whether or not there is any relationship between the condition which you diagnosed and such exposures?

Mr. Levinson: I object to that, if the Court please. The hypothetical question does not include all of the elements involved.

The Court: Doesn't it involve the same situation exactly as that ruled upon yesterday adversely to your contention?

(Deposition of Dr. James C. Schumacher.)

Mr. Levinson: Yes.

The Court: This Doctor received this [439] party to the action now before the Court as a patient, and he examined him for the purpose of treating his disease?

Mr. Levinson: That is right.

The Court: Or his ailment.

Mr. Levinson: Yes. The same objection. The same facts are involved.

The Court: The objection is overruled.

(Continuing reading.)

Mr. Michelson: \* \* \* I would like to ask the doctor the question if he knows of such a regulation.

A. No, we are permitted to give testimony as long as we have the permission of the Commanding Officer, but we are supposedly—it is supposed to be expert testimony at that time.

Q. Did you secure the permission of the Commanding Officer?

A. Yes, I have his permission to be here.

Q. (Mr. Kay): Have you my question in mind, Doctor? A. Will you please repeat it?

(Question read by the Reporter.)

A. In my opinion, there is no relationship between the exposure to the smoke and the condition for which I treated him.

Q. And will you explain why you have that opinion, Doctor?

A. Well, iritis or iridocyclitis is an inflammation of the deeper tissues of the eye, and there are a lim-



(Deposition of Dr. James C. Schumacher.)

ited number of things which cause it. The most common cause is some endogenous toxin, either a toxin as such, or a toxin from a disease, such as syphilis, tuberculosis, gonorrhea, or you can also get it from injuries; but the injuries which [440] do cause it have to be of a very severe nature, either a penetrating type of injury, or a very severe contusion of the eye are about the only things which will cause it.

Q. Was there any history on the part of the patient, or from any other source that he had any such injuries which would be likely to cause or aggravate the condition of iritis or iridocyclitis?

A. From the history that the patient gave me there was none.

Q. Now, Doctor, there is a report in your records here under the heading of "Special Examination and Treatment Request, U. S. Naval Hospital," and it contains the signature of H. A. Kaven (M.C.) U.S.N. Where did you secure that report?

A. The patient brought that with him.

Q. The patient brought that with him. And what did he indicate that that was, or where he got it?

A. He told me that he got this from the Naval Officer who examined him in Alaska.

Q. And would you read that into the record, the report?

\* \* \* \*

A. (Reading) "P.X. Left eye. Tactile tension soft."

Then the next paragraph is:

(Deposition of Dr. James C. Schumacher.)

“Cornea-keratitic deposits on posterior cornea surface, lower  $1\frac{1}{2}$ . Iris appears muddy.”

Then below that is another paragraph:

“R.X. 1% atropine sulphate sol. Drops 1 tid.”

Another paragraph:

“Hot compresses 20 min bid.”

Q. What does “bid.” mean?

A. That means twice a day. [441]

Q. This description that you have read of the condition of the eye, state whether or not that is a typical symptom of the condition which you eventually found?

A. The description which appears here is a typical description of iritis.

Q. Yes. A. Or iridocyclitis.

Q. And how about the treatment, is that standard treatment that the Doctor indicated there for that type of condition?

A. The treatment indicated is standard for iritis or iridocyclitis.

The next part is already in evidence.

Mr. Franklin: I think the next matter omitted, and the only other matter appears at page 16, lines 12 to 20.

Mr. Long: Page 16 of the deposition, line 12.

Q. Assuming these exposures to smoke caused some inflammation of the eyelids and irritation of the eyes, as smoke would, state whether in your opinion that exposure and those resulting conditions caused or aggravated the present condition of iridocyclitis?

(Deposition of Dr. James C. Schumacher.)

A. Well, the inflammation of the lids or the irritation of the eye caused by the smoke, in my opinion, would not cause the iritis or the iridocyclitis or aggravate the condition that was present before.

Mr. Long: I think that concludes the entire reading of the deposition, your Honor, of Dr. James C. Schumacher, and it [442] is agreed, I think, by counsel, with the permission of the Court, that if we overlooked any particular remark or sentence it may be all included, and we therefore now offer in evidence the deposition of Dr. James C. Schumacher in its entirety.

The Court: There being no objection, the same is now received in evidence as part of the Respondents' case in chief.

I will say to counsel that if you think by reason of the circumstances under which part of this deposition was read in the form of an offer of proof, in the first instance, that that circumstance would justify you in calling to the court's mind any special part of it, the court encourages you in your desire to do so, if you should have such a desire. I do not mean at this moment.

Mr. Long: I understand, your Honor.

(Deposition Concluded.)

The Court: In that connection, there is some possibility that the Court may—I do not know yet what the attitude of the Court will be, but it will be stated later—it is possible that the Court will prefer to hear argument on this case after my return from San Francisco. That is one reason why I made the previous statement.

Mr. Long: If your Honor please, in the interests of clarity in the record, inasmuch as there has been admitted as an exhibit the clinical abstract or hospital [443] record as an exhibit, I should like to mark this deposition as an exhibit and offer it as such, because of the fact that there was some confusion in connection with the offer of proof, and I do not want any part of it omitted from any part of the reporter's transcript of the testimony.

Mr. Levinson: May I be heard on that?

The Court: Yes.

Mr. Levinson: I think that is highly improper. It has been read twice already to your Honor, and that is the only deposition that is offered as an exhibit as such.

There can be no confusion in the record, because the only confusion would relate to the objection as to privilege, and that has been withdrawn. So I see absolutely no reason why we should further clutter this record with this one deposition as an exhibit. It has been received in evidence, the document referred to in the deposition, the clinical record has already been received, which has been true of a number of other exhibits identified in depositions, for instance, the pictures.

The Court: I will say for the information of all counsel that my attitude is that the point raised by this motion involves only a hair-splitting proposition. Counsel for these respondents have in a recent proceeding made the point that is here involved by having the deposition admitted as an ex-

hibit in the case. I assume that he thought by doing so that the form of the evidence would be a little more convenient to the court, the trial court [444] or the appellate court, if the appellate court should review the matter.

It had never occurred to me before that anybody might think that I could not, while considering this case on the facts as well as the law, in order to come to a decision—that I would be denied access to the deposition.

Mr. Levinson: No.

The Court: It never occurred to me that anybody would suppose that the trial judge would be denied access to the deposition. I will tell you frankly that if I have occasion to want to review all of this evidence that I expect to go to the files of the clerk and read this deposition again.

Mr. Long: I understand that, your Honor. I want to make my position clear, because there is a decision in our Circuit Court which leaves the matter very much muddled. A case arose in San Francisco where the procedure was followed of simply reading a deposition, as is frequently done, and not marking it as an exhibit, and the Circuit Court took occasion to criticize that procedure. They did not refuse to review the evidence, but they said it might be marked as an exhibit, and then the exhibit comes before them.

The Court: I will take counsel's word for the fact that there may have been some implied preference expressed on behalf of the Appellate Court on that occasion. Just out of precaution I will grant



the motion, but I will say it will not affect this court one way or the other. [445]

Mr. Long: I realize that, your Honor, but I do not really know what the proper practice is, your Honor.

The Court: Here is the original copy. Is that the one you want marked?

Mr. Long: If you please.

The Court: Let it be marked as Respondents' Exhibit A-14. It has the clerk's filing mark on it. Let the record show that it is admitted in evidence.

(Deposition of Dr. James C. Schumacher received in evidence as Respondents' Exhibit A-14.)

Is there anything else?

Mr. Franklin: The Respondents rest, if the Court please.

The Court: The Respondents rest. The Libellant may proceed.

Mr. Levinson: Your Honor, as part of the case in chief of the Respondents—or at least I was served a notice—either a notice or it was by stipulation—the deposition of Captain Paul Zeigler, a Doctor on board the vessel, was taken by Respondents on June 5, 1944, and I, of course, have not introduced it as part of my case in chief because it was taken as a deposition of the Respondents, and I had no way of knowing whether the Respondents would introduce that deposition or not. They did not see fit to do so, so therefore I would like leave to introduce that deposition on rebuttal, even though



part of it may really relate to the Libelant's case in chief.

It was a deposition taken by respondents, and I did not know until now whether they would introduce it, [446] although I assumed they would. They read every deposition except two taken in San Francisco, which didn't amount to anything.

The Court: Do you wish to offer that as part of the Libelant's case?

Mr. Levinson: As part of the Libelant's case, yes, your Honor.

The Court: Is there any objection?

Mr. Franklin: No objection, your Honor.

The Court: As part of your case in chief, Mr. Levinson?

Mr. Long: Let us offer it as part of the case in chief. It doesn't make any difference, your Honor.

I would not say the case should be opened for its introduction. The Court will realize that this witness was called by the Respondents. I do not know whether it is proper to give it any designation as either evidence for the Respondents or the Libelant, although I am frank to say that the record may show that I am making the motion to introduce it.

The Court: In your case in chief?

Mr. Levinson: Yes.

The Court: That motion is granted, and the Libelant's case in chief is opened up for that purpose.

Mr. Long: The record may show that we have no objection.

The Court: Let the record so show. [447]

## PAUL ZEIGLER,

called as a witness by Deposition on behalf of Respondents, the deposition being read in evidence on behalf of Libellant, as follows:

## Direct Examination

By Mr. Franklin:

Q. Will you state your name, please?

A. My name is Capt. Paul Zeigler, Medical Corps, United States Army.

Q. Captain Zeigler, how long have you held a commission in the United States Army Medical Corps?      A. Two years this last April.

Q. Captain Zeigler, what medical school did you graduate from?      A. Oklahoma University.

Q. Approximately when?

A. I finished medical school in 1934.

Q. Would you please sketch your professional career following graduation?

A. After graduation at Oklahoma University in 1934 I took a year of rotating internship at Fresno County General Hospital. After that I returned to Texas and practiced general medicine and surgery in association with my brother and father until I came into the Army two years ago.

Mr. Levinson: That would be 1936 to 1942, approximately?      A. 1942.

Q. Captain Zeigler, during the year 1943, particularly referring to the months of July, August and September, [448] 1943, to what vessel were you attached?

(Deposition of Paul Zeigler.)

A. Do you want me to tell you what I was attached to before I went on this particular ship?

Q. No.

A. In the latter part of June, 1943, I was attached to the SS George Flavel, an Army transport, and sailed on its first voyage from San Francisco.

Q. Were you the transport surgeon aboard the vessel? A. I was the transport surgeon.

Q. Are you still holding that post?

A. I am, yes, sir; general transport surgeon of the ship.

Q. You are leaving on the George Flavel in the near future to be gone for an indefinite period of time?

A. I guess you would say that. It is on military affairs. As far as I know I will leave in the near future on the Flavel for another trip.

Q. You do not know whether you will be here at the time this case may come on for trial?

A. I do not know where the ship goes or anything.

Q. While you were aboard the George Flavel did you have occasion to treat a Mr. Walter Lubinski, the boatswain on the vessel? A. I did.

Q. Would you tell us approximately when you first treated him?

A. Since the treatment of this man has been the length of time ago that it has been I am not so sure about my dates of treatment of this man. As

(Deposition of Paul Zeigler.)

well as I can remember, he appeared for treatment——

Mr. Franklin: I think the record shows [449] he was referring to a letter that he had written to the Alaska Steamship Company for the purpose of refreshing his recollection, and he answers over on line 9, on page 6.

Mr. Levinson: I think we can go clear on to line 8 on page 7.

Q. Just answer the question. At whose request was that report made?

A. As I remember it—it is so long now—I have forgotten whether he or the skipper requested it.

Q. Captain Zeigler, approximately when, according to your best recollection, did Mr. Lubinski first report for treatment?

A. Well, to the best of my recollection he appeared for treatment some time the latter part of August.

Q. Of 1943?            A. 1943.

Q. For what condition did he report for treatment at that time?

A. He came in complaining of intense pain in the left side of the face, and an inability to see clearly from the left eye.

Q. At the time you treated him did he tell you how long his pain and symptoms had persisted before he saw you?

A. I am not so sure about that, but it seems to me he said it had been in existence for two or three weeks, something like that.

(Deposition of Paul Zeigler.)

Q. Captain, you can refresh your recollection.

Mr. Levinson: I object to that, but he can go ahead. [450]

Q. You can refresh your recollection by that document. What examination did you make of his left eye at that time for limited vision?

A. I had no ophthalmoscope and for that reason was unable to make a complete and thorough examination of the eye.

Q. By that do you mean the inside of the eye?

A. Well, the ophthalmoscope is used for visualization into the eye and all of the structures from the interior of the eye through. Because of the lack of the ophthalmoscope my examination was purely from observation and tactile sense—feeling, in other words.

Q. Did you reach any conclusion as to what he was suffering from, from that examination?

A. The eye was inflamed, red, and had a conjunctivitis. There was some discoloration of the iris.

Q. That is the pupil of the eye?

A. The iris is the coloring in the eye.

Q. At the time you made this examination did you observe any evidence of abrasion of the left eyeball itself?      A. I did not.

Q. Did you observe any evidence of a foreign body in the left eye?      A. I did not.

Q. What did you do with reference to treating him?

A. In the treatment of this man I gave him a hypodermic, thiaman hydrochloride, and then I ir-

(Deposition of Paul Zeigler.)

irrigated the eye and instilled into it—I irrigated it with a solution of boric acid. That is what I used to irrigate it with, and instilled into it an ointment of butyn and metaphryn. The ointment was an an-aesthetic as well as a [451] mild antiseptic.

Q. How did he respond to this treatment?

A. Very shortly. I will say 24 hours, or maybe 48 hours. I have forgotten which. The pain in his face was almost entirely gone, but the symptoms of the eye were very little improved. That is, he still was unable to see clearly from the eye.

Q. What was the degree of vision that he had when he first consulted you, from what he told you?

A. Very little vision. He had light perception of gross objects. He could see me, but he couldn't make out anything definite.

Q. Would you classify him as economically blind or otherwise at the time you first saw him?

Mr. Levinson: I object to that.

A. Might I ask you what you mean by economic blindness?

Q. I will withdraw the question. What was your opinion as to the degree of useful vision he had?

A. None.

Q. Subsequently, Captain Zeigler, were you able to send Mr. Lubinski ashore and have an eye specialist examine him?      A. I did.

Q. And that occurred where?

A. I sent him ashore to the Navy hospital in Adak, to see a medical officer by the name of H. A. Kaven.



(Deposition of Paul Zeigler.)

Q. He was an eye specialist? A. Yes.

Q. You subsequently received a report?

A. I received a report.

Q. You cannot tell what it showed because that would be [452] hearsay. Subsequently did you arrange to have Mr. Lubinski treated or examined in Honolulu?

A. I believe it was the skipper that sent him ashore there for an examination, but I didn't see the report of that examination.

Q. At any time, Captain Zeigler, were you called upon to treat the eyelids, both eyelids of Mr. Lubinski? A. No, sir; not to my recollection.

Q. Captain, did Mr. Lubinski ever advise you or tell you what in his opinion was the cause of the condition of his left eye?

A. I don't recall that he did, other than to say that he had been exposed to cold wind on the deck, as well as dust, and possibly smoke.

Q. At any time that he was under your treatment, Captain, did you observe any evidence of economic damage to the external part of the eye?

A. Now, that sort of a question is a little bit difficult to answer, because with a conjunctivitis it would be possible that that could be the cause; though I did suggest to him that he should have himself examined physically, because the condition of his eye might be caused from his systemic source.

Q. By that you mean what?

A. Such as bad teeth or bad blood, or something of that nature.

(Deposition of Paul Zeigler.)

Q. Did you have occasion to treat his nose or sinuses?

A. Following his examination at Adak I did pack his nose because of the irritation therein.

Q. Did you treat his sinuses at that time? [453]

A. His nose pack was in an effort to relieve the congestion in the nasal passages in the region of the opening into the sinuses.

Q. What was the result of that treatment with reference to the relief afforded Mr. Lubinski?

A. He got quite a bit of drainage after the packs were removed, and some comfort.

Mr. Franklin: That is all.

#### Cross Examination

By Mr. Levinson:

Q. Doctor, you are a general practitioner?—that is, your training is that?

A. General practitioner, yes, sir; general medicine and surgery.

Q. You are not specializing in eyes, are you?

A. No, sir.

Q. And your only treatment of eyes is such that might follow——

A. The type of work that I have been doing with eyes that is associated with general medicine.

Q. Doctor, you had been on this vessel since June of 1943?

A. That is right.

Q. And when you first saw Mr. Lubinski professionally that was some time——

A. Some time in August.

(Deposition of Paul Zeigler.)

Q. After the Kiska invasion?

A. The invasion was the 15th of August.

Q. This was after that, wasn't it?

A. As I remember it, it was. [454]

Q. Had you had occasion to observe or notice Mr. Lubinski on that vessel before the time he came to you professionally?

A. I had just seen him about on the ship, as I had seen other members of the crew.

Q. And during such time, prior to his professional visit, he appeared to be doing his work normally?

A. As far as I could tell. Of course that was out of my line. I don't know anything about the duties of a boatswain.

Q. I mean with relation to any physical disability. He seemed to be able to do anything?

A. As far as I could tell. Of course if you look on the street and see a man you wouldn't know whether he was seeing good with one eye or both of them.

Q. At the time you examined him professionally, in the latter part of August, his eye, for all practical purposes was valueless?

A. That is right—at the time I examined him.

Q. It would be easily apparent to a cursory examination, the condition he was in? You saw he had some trouble with his eye?

A. That is right.

Q. As soon as he appeared before you you saw that?

A. That is right.

(Deposition of Paul Zeigler.)

Q. And it would be clearly obvious to any person of ordinary perception at any time that something was wrong with the eye?

A. At the time I saw him; yes, sir.

Q. If he had had that eye condition when he joined the [455] vessel it would have been easily apparent?

A. That is right.

Q. You recall at the time of the Kiska invasion there had been a fire on the vessel?

A. That is right.

Q. It was a matter that you could observe, the smoke coming out of the hold?

A. That is right. It filled the hold and the hospital.

Q. And immediately prior thereto, in Attu, there had also been a fire in the forepeak; that is, a lot of smoke coming out?

A. I am not so familiar with that time.

Q. You knew there was such a fire?

A. I had heard of it.

The Court: Is he still talking about Kiska?

Mr. Franklin: Now he is going back to Attu. I had just read line 20 on page 14.

The Court: At line 15 he speaks of Attu.

Mr. Franklin: Yes; that is right, your Honor.

The Court: All right.

Q. There was a lot of smoke?

A. I am not familiar with that incident.

Q. At least it was a matter of common knowledge on the vessel?

(Deposition of Paul Zeigler.)

A. The only thing I know about that is hearsay. I didn't see it or have any experience whatsoever with it.

Q. You, of course, as you stated in your direct examination, had no ophthalmoscope? [456]

A. That is right.

Q. And your examination was limited to your own observation, plus such tactile knowledge as you were able to obtain?

A. Yes.

Q. You did not have the facilities, did you, Doctor, to detect whether there was any damage to the inside of the eyeball?

A. That is right.

Q. The irritation, or what you observed, was it such that could have been caused by smoke?

Mr. Levinson: Now, your Honor, there is quite a bit of controversy and the objection, and the witness finally answered the question. The objection was made, if the Court please, that it was improper cross examination, because the witness on direct examination had been merely called to testify to the condition he found and the treatment he gave, and that this was an effort to expand his testimony into expressing an opinion as to whether Mr. Lubinski's condition was or was not the result of the exposure, and I have preserved that objection.

The Court: If counsel wish to submit the question the Court is ready to rule upon the objection now.

Mr. Levinson: Before submitting it, he did testify on his direct examination that Lubinski told him it was caused by wind or [457] smoke.

(Deposition of Paul Zeigler.)

The Court: I do not see any reason why you cannot ask him if it was caused by something else, on cross examination. The objection is overruled.

Mr. Franklin: An exception, your Honor.

The Court: Exception allowed.

Mr. Levinson: Beginning on page 17, line 15. The preceding two pages are all colloquy between counsel.

The Court: You are going now to where?

Mr. Franklin: Line 15, page 17.

Q. The irritation, or what you observed, was it such that could have been caused by smoke?

A. The question as put is difficult to answer, in that sometimes eyes appear with a conjunctivitis possibly caused from some irritant such as smoke. It that what you mean?

Q. Just give me what your recollection is, Doctor. Mr. Lubinski could possibly have had some injury to the eyeball which with the limited facilities available to you would not have been apparent; that is correct, isn't it?

A. I don't know how you mean that.

Q. In other words, you made the best examination that you could?

A. Most usually—I would say it would be possible with an eye irritated in that condition, as seen with the meager methods I had of examination—it would have been possible, probably, that some external irritant [458] could have started the situation.



(Deposition of Paul Zeigler.)

Q. The treatment you gave him was a palliative treatment, to reduce the pain?

A. To reduce the pain; clear up any associated external irritation or infection; give the man comfort. And since he had this associated irritation of the side of his face I gave him Vitamin B in an effort to relieve the pain, and the symptoms associated with it.

Q. You didn't expect, or couldn't, with the limited facilities aboard the vessel, you couldn't expect to treat the condition of the eye itself with relation to its visual capacity, or the visual limitation that it had?

A. Well, in a measure I would say it would be in accordance—let me change that a little.

Q. You can strike it altogether and start all over again.

A. Will you state your question again?

(Question read.)

I would say yes, with the facilities we had we could.

Q. Only so far as it may have been caused by some external condition at that time that you saw it?

A. Well, without a complete and thorough physical examination, inclusive of a blood examination and the ability to extract teeth that may have been affected, or give deep treatments for the relief of some inflammatory condition, possibly of the sinuses, or something, I would say no.

(Deposition of Paul Zeigler.)

Q. As far as you were able to ascertain from your examination he apparently had no——

A. (Interposing): I might state this——

Q. Let me finish—he apparently had no systemic condition; [459] he looked to be in good health, looked like a pretty husky boy?

A. Yes; he looked like a healthy person.

Q. And you have to rely almost entirely then on any history that he gave you for any such condition?

A. On the laboratory findings.

Q. Did he give you any history of any systemic condition?

A. None that I recall.

Q. Did you make an examination?

A. I have forgotten. As I remember it, I did. But as I say, this has been a year ago. How can I remember one case out of thousands I have seen?

Q. At least you have no recollection of having him inform you of any such condition?

A. I don't remember.

Q. I want to be fair with you.

A. Seeing thousands of cases in a year's time, and going back to one out of many thousands I have seen, I can't remember all the details.

Q. Of course you are very busy; you are the only doctor aboard?

A. The only medical officer aboard.

Q. And many hundreds of men pass before you?

A. That is right. I have seen several thousand men since this case came up. I don't remember.

Q. In your experience, Doctor, could the condition of which he complained when he came to see

(Deposition of Paul Zeigler.)

you have been caused by a smoke irritant of some kind?

Mr. Franklin: That is objected to on the ground that it is improper cross examination. The doctor has [460] not qualified as an expert. If you care to answer it, Doctor, you may do so.

A. Well, I will tell you, it has been so long since I treated the man that I would like not to answer the question so specifically.

Q. I am just asking you for your opinion, Doctor. That is all I can ask, is your honest opinion, the best you can recall.

Mr. Franklin: Do you want the doctor in answering that to consider that the man had a soft chancre in 1941?

Mr. Levinson: I am asking for the opinion he has, not the opinion you are trying to tell him.

A. I will tell you; at the time I saw the man I told the man that I thought he should have a thorough examination, inclusive of a blood count, or blood Wasserman, because in my opinion, as I told him, this condition is very often caused from some systemic thing.

Q. Is it not also your opinion that a condition of this nature——

Mr. Franklin: What condition are you referring to, neuritis or conjunctivitis or what? Be fair to the doctor.

Q. Is it your opinion that the condition that you observed in this man when you examined him, if caused, as you say, by some systemic condition,

(Deposition of Paul Zeigler.)

might have been quiescent and then have been lit up or become activated by some——

A. That might be possible.

Q. By some smoke irritant?

A. By some external irritant.

Q. That is possible, Doctor? [461]

A. That is possible.

Q. Would it have been probable under those circumstances, assuming the history that the man had no difficulty with his eyes at any time up to the time of the irritation? A. It might be.

Q. That would be a logical conclusion?

Mr. Franklin: Objected to as leading your own witness.

Q. If you want to include the hypothesis of a systemic condition as the cause of the visual failure? A. Well——

Q. Get my question and you may answer yes or no, and then explain if you wish. Do you understand my question?

A. It is so screwed up I don't know if I do.

Q. Let us try again. Let us assume purely for the purpose of this question that there may have been a prior systemic condition which was the basic cause of the visual failure, that the man had no trouble with his eye, that his eye seemed perfectly normal, and he was able to use the eye and had normal vision, with this latent condition within him would it have been possible for the smoke irritant to have caused this condition to become active and

(Deposition of Paul Zeigler.)

to have resulted then and there in a limitation or loss of sight as far as the eye is concerned?

A. It might have been.

Q. For the purpose of this question, assuming the man had good eyes would you then say that the smoke was the causative factor that brought the eye to the condition of a loss of vision?

A. I don't know. [462]

Q. Is it possible in medical science for such a condition to so develop?

A. What kind of smoke are you referring to?

Q. Any strong smoke, any irritant smoke.

A. Maybe I had better have you qualify what type of smoke you refer to in these questions, and what kind of chemical agent is in the smoke.

Q. That I cannot tell you, Doctor, except an ordinary heavy smoke that resulted in a great deal of irritation. Would that be sufficient?

A. Of course smoke getting in the eyes, causing a marked irritation and inflammation might cause something of that kind. That we are unable to say, which came first—the same as the hen or the egg.

Q. Isn't it a fact that any degree of substantial irritation to the eyeball might cause a quiescent condition to become active and affect the sight, where if not for the existence of the prior condition the sight would remain normal with the passage of the irritation?

A. In my opinion——

Mr. Franklin: If you don't know, just say you don't know.



(Deposition of Paul Zeigler.)

A. Such a hypothetical question, I don't know that I am qualified to answer it.

Q. Let me put it this way: I am going to try to be fair——

A. If this is cross examination, I didn't know I was coming up here for that. My opinion, as I have told you—I am no eye specialist, and I am not a specialist in eye, ear, nose and throat diseases—I only treat those who come to me in a general medical sense, and you will [463] have to put the questions to be answered by me as to a practitioner of general medicine, and not as to a person who specializes in eye conditions.

Q. Just let me put it this way. You will not be here at the time of the trial, and the Court might like the benefit of your opinion. Let us put it down to cases rather than a general hypothetical question. We will refer specifically to this man. Let us assume for the purpose of this question that Lubinski had a systemic condition, some source of infection within his body——

Mr. Levinson: I am skipping the colloquy.

Q. (Continuing): —which might be sufficient to have caused a loss of vision, such systemic condition resulting ultimately in an inflammation of one of the coats within the eyeball, of the uveitis; that the man had this latent condition within him, has this systemic condition; he has no trouble with his eyes for, say, four years, or five years prior to the time of your examination—or a substantial time prior thereto; would it be possible that Lubinski



(Deposition of Paul Zeigler.)

having this quiescent condition that an extreme smoke irritation by any type of heavy smoke that would cause the eye to become inflamed, it would increase the activity within the eyeball, the circulation of the blood; would that be sufficient to cause this systemic condition to become active and result in an inflammation of one of the inner linings of the eye? A. In my opinion it might.

Q. You did pack his nose, didn't you?

A. Yes.

Q. To attempt to alleviate some of the pain he had in the [464] sinuses? A. Yes.

Q. These sinuses, of course, have a moist surface, or a mucous membrane?

A. They do have.

Q. To that extent it is somewhat similar to the moist surface of the eyeball?

A. Yes; I would say similar.

Q. And irritation that would become manifest on the moist surface of the sinuses would also become apparent on the moist surface of the eyeball; it would be the same type of irritation?

Mr. Franklin: Objected to as leading. Do not lead your witness.

Mr. Levinson: He is not my witness.

A. Well, some things are a lot more irritant to the eye than they are to the nose. If an irritant is strong enough I would say it is possible to irritate the nose at the same time as the eye.

Q. Then if it was sufficiently strong to irritate the nose and the musous membrane of the sinuses

(Deposition of Paul Zeigler.)

it would certainly have a much stronger effect on the mucous surface of the eye?      A. Yes.

Q. And that might set up a secondary condition within the eyeball, because of the activity set in motion by the irritation of the surface of the eyeball?

A. State that again. (Question read) That might be possible, in my opinion.

Mr. Levinson: I think that is all. [465]

The Witness: There is another thing—well, I won't say it, because you will start asking other questions.

Mr. Franklin: I have one last question.

The Witness: Irritation of the wind on the side of the face. That has something to do with it.

Mr. Franklin: In what way, Doctor?

The Witness: Irritation to the nerve in the side of the face.

Mr. Levinson: Go ahead, if you want to take him on from there.

The Witness: I am sorry I mentioned that. I do not want any more questions. I am ready to go.

Q. (Mr. Levinson): Well, that is just ordinary cold. For instance, cold will sometimes cause an injury to the nerve in the side of the face, sleeping by an open window?      A. That is right.

Q. That causes a person to have pain or neuralgia in the side of the face?

A. That is right. Off the record and just between us, when he first came in that is what I had in mind.

(Deposition of Paul Zeigler.)

Q. And yet that irritation would not manifest itself by an irritation of the sinuses, would it?

A. It could.

Q. But isn't it a more likely hypothesis that the smoke caused this irritation?

A. I would say the smoke irritates the sinuses more often than a nerve irritation.

Q. And a person who has been to sea a good many years and works on the deck of a ship in all types of weather, [466] and often in strong winds and rain and sleet, as far as facial nerves are concerned, develops more or less of an immunity, doesn't he?      A. I don't know.

Q. In your experience as a medical man——

A. (Interposing): Well, you eat bread every day, and some day you may get a little piece of bread and there is something in it a little irritating to the bowel, or your bowel may not be in par condition that day—that is just enough to throw it off.

Q. What I had in mind was this particular hypothesis of the likelihood of a neuritis in the face as a result of exposure to the wind. Constant exposure to wind in the course of one's occupation has a tendency to toughen the membranes of the face of the average sailor, doesn't it?

A. Yes, I imagine so.

Mr. Levinson: I think that is all, unless you want to start something else.

Redirect Examination

Q. (By Mr. Franklin): Doctor, did you make

(Deposition of Paul Zeigler.)

a diagnosis of what this condition of the eye was that you treated him for?

A. The diagnosis I made was a conjunctivitis and iritis, with associated neuritis of the face.

Mr. Franklin: That is all, Doctor. Thank you.

### Recross Examination

Q. (By Mr. Levinson): This conjunctivitis could have been caused by smoke? [467]

A. Or dust or wind, or soapy water or chemicals; or most anything that is irritating. Or it could have come from association with iritis.

Q. If those are eliminated, except smoke, that could have been the cause?

A. Assuming they are eliminated. Smoke does cause an irritation of the eyes.

Q. Just one other question. Did Lubinski seem fair to you?

A. He seemed perfectly fair, and seemed to take me into his confidence.

Q. He answered your questions?

A. He answered my questions freely, was very co-operative, and did everything in his power to do things for his health.

Mr. Levinson: That is all.

Mr. Franklin: Just one other question. You say conjunctivitis frequently is a consequence of an iritis?

Mr. Levinson: No.

The Witness: A conjunctivitis may occur with an iritis.

(Deposition of Paul Zeigler.)

Mr. Franklin: That is all.

Mr. Levinson: That is all.

Mr. Franklin: Doctor Zeigler, do you waive the reading and signing of your deposition?

The Witness: Yes.

Mr. Levinson: I waive the reading and signing of the deposition.

(Deposition concluded.) [468]

Mr. Levinson: I am offering this testimony as indicated.

The Court: This deposition of Captain Paul Zeigler is received as part of the Libelant's case in chief. Does the Libelant rest its case?

Mr. Levinson: I have some rebuttal, and then I will have finished. I have Mr. Lubinski.

The Court: The question is at this stage of the proceedings, do you now close your case in chief?

Mr. Levinson: Yes, your Honor.

The Court: The Libelant's case in chief is closed. The Respondents' case in chief has been rested, and now you wish to offer rebuttal, is that right?

Mr. Levinson: That is correct.

The Court: The Libelant may proceed.

Mr. Levinson: I will recall Mr. Lubinski.

---

WALTER LUBINSKI,

recalled as a witness in his own behalf as Libelant, testified in Rebuttal as follows, having been previously sworn:

(Testimony of Walter Lubinski.)

Direct Examination

By Mr. Levinson:

Q. Mr. Lubinski, have you ever had syphilis?

A. No, sir.

Q. Or any sinus trouble? A. No, sir.

Q. Any trouble with your teeth?

A. No, sir.

Q. In what condition are your teeth now?

A. Perfect shape. I have three fillings in my mouth. [469]

Q. Have you ever had rheumatism?

A. No, sir.

Q. Have you taken blood tests since you have been going to sea?

A. I have taken them on numerous occasions since 1935.

Q. About how many?

A. Oh, 15 or 20, I guess.

Q. State the result of the blood test?

A. They have all been negative.

Q. Have you ever had a positive blood test?

A. Never.

Q. Have you had X-rays of your body to determine any possibility of disease in your body?

A. Yes, I have.

Q. As far as X-rays would show it?

A. Yes, sir.

Q. What has been the result of those X-rays?

A. They have all been negative.

Q. In general, what has been the condition of your health, except for your eye, up to the present time?



(Testimony of Walter Lubinski.)

A. All I ever had was an appendectomy; and I had a localized soft chancre in Panama. It is the same as a pimple.

Q. How long ago was that? A. 1941.

Q. Have you ever had any other illness or disease, to your recollection?

A. No; none that I know of.

Q. Have you ascertained whether it is possible for you to go for your examination for a Second Mate's license? A. I have. [470]

Q. With relation to your eye, what has been the answer? Can you?

A. No; I cannot get a license now.

Q. Why not?

A. Because I only have one eye.

Q. In the Aleutian Islands, at Attu, on July 15, 1943, how much daylight is there?

A. About 20 or 22 hours.

Q. At 9:00 o'clock at night or 10:00 o'clock at night, at the time of the fire, what was the condition with reference to light?

A. It was broad daylight. Excuse me—if I may say it—you do not have a complete darkness, you just have twilight at that time of the year.

Q. Mr. Kristiensen, the First Mate, testified that no complaint was ever made by you immediately after the fire at Attu, in connection with your eye, that it had been affected and irritated by an explosive fume; is that the fact? A. No.

Q. Was such a complaint made?

A. Yes, sir.

(Testimony of Walter Lubinski.)

Q. By whom? A. By me.

Q. Mr. Kristiensen also testified that he directed you to stow these smoke bombs in the forepeak; is that the fact? A. That is not.

Q. What was your first knowledge that the bombs were stowed there?

A. When I came down to the forepeak to work I seen all that [471] stuff stowed down there.

Q. Mr. Kristiensen also testified that this was your first service as boatswain on a vessel; is that true? A. No.

Q. On how many vessels had you served as boatswain?

A. I have been on some of the biggest ships on this coast.

Q. How many years?

A. The last three years.

Q. The last three years prior to——

A. Prior to this "Flavel."

Q. Mr. Kristiensen testified that you never told him that you had gone to see the Doctor about your eyes prior to the Kiska fire; is that the fact?

A. It is not.

Q. Had you informed Mr. Kristiensen of it?

A. He knew it. It was a standing order. He knew I went down every day. I went down around 8:30 in the morning.

Q. Mr. Seather testified concerning the gas mask, and he stated that it had a mouthpiece that

(Testimony of Walter Lubinski.)

fitted into the mouth. The gas mask that you used, was it that type of mask?           A. No, sir.

Q. What kind of arrangement did it have?

A. The mask, as I recall it, that was issued to us by the Army in San Francisco was a plain mask that fits over your face, and has a tube that you breathe through. It is the same as a person giving a "Bronx" cheer at a boxing match or a wrestling match,—sort of a flutter valve.

Q. Did it have a mouthpiece?           A. No.

Q. Mr. Seather testified that you at no time complained that [472] your eyes had become irritated from exposure to the smoke; is that the fact?

A. No.

Q. Was any request or any statement ever made by Seather as to what your condition was?

A. No; there was not.

Q. Dr. Barkan testified in his deposition that you were there on one occasion. In fact, how many times were you there?           A. I was there twice.

Q. Captain Zeigler testified that you presented yourself, he said to the best of his recollection, sometime the latter part of August, 1943. Is that the correct date?           A. No; it is not.

Q. When did you present yourself for treatment to the Doctor?

A. Right after the Attu fire. Might I explain that?

The Court: You may do so.

The Witness: Right after the Attu fire lots of times Dr. Zeigler was not there. He had about eight

(Testimony of Walter Lubinski.)

assistants, and after the first two or three times, outside of giving me shots in the arm, which was chloride or thiamin chloride—Vitamin B—his attendants took care of me,—his assistants.

Mr. Levinson: That is all.

Mr. Franklin: No questions.

The Court: That is all.

(Witness excused.) [473]

Mr. Levinson: The Libelant rests.

The Court: Do the Respondents rest?

Mr. Franklin: Yes, your Honor.

The Court: How long do you suppose you gentlemen want to argue this matter?

Mr. Levinson: The Libelant would like at least an hour. Usually I do not take that much time, but in this case I think that I will require an hour.

The Court: What is the idea of the Respondents as to time?

Mr. Franklin: I think at least an hour.

The Court: Would counsel have any interest in filing briefs on the facts, as well as the law, before they make their oral argument, so that the court could have in mind your line-up and theory of the facts more accurately? Would counsel on either side have any desire to do that?

Mr. Levinson: If it would be of any assistance to the court.

Mr. Franklin: If it would be of any assistance to the court, we would be very glad to do that.

The Court: This apparently is an important case to both sides, and it will not be an easy case,

I believe, for the court to decide, so I will ask your assistance in that way, that you file briefs.

The trial of this case is not yet finished, and it will not be finished until the Court hears the oral argument, and the case is continued for further trial in the form of oral argument, after you file briefs. I think this case will be placed on the trial calendar for [474] February 20th.

Mr. Franklin: Your Honor, will you fix any time for the filing of briefs, or should they be merely filed prior to that date?

The Court: They will have to be on file before the 19th, all briefs that you wish to file in this matter. And I wish you would have this in mind as one particular objective, that you do all you can to clarify by reference to the record your theory of the facts and the acts of negligence that you claim, or the acts that the respondents may claim to show there was not any negligence, if that is their position. I assume that is their position at this trial.

Mr. Franklin: Yes. I presume your Honor wishes simultaneous briefs?

The Court: Yes. I want all briefs in.

Mr. Long: What we had in mind; does the Libekant file first and then we answer?

The Court: Simultaneous briefs, and all briefs must be on file not later than the 19th of February, 1945.

(Whereupon, further hearing was continued until February 20, 1945.)

[Endorsed]: Filed June 2, 1945. [475]

[Endorsed]: No. 11097. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Walter Lubinski, Appellee, Walter Lubinski, Appellant, vs. Alaska Steamship Co., a corporation, Appellee. Apostles on Appeal Upon Appeals from the District Court of the United States for the Western District of Washington, Northern Division.

Filed: July 12, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

---

In the United States Circuit Court of Appeals  
For the Ninth Circuit

No. 11097

WALTER LUBINSKI,

Appellee

vs.

UNITED STATES OF AMERICA,

Appellant.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF THE PARTS OF THE APOSTLES ON APPEAL NECESSARY FOR THE CONSIDERATION THEREFORE

Comes now the appellant and files with the above named Court, pursuant to Rule 19, sub-division 6,



of the Rules of this Court, statement of the points on which appellant intends to rely on appeal as follows:

I.

Appellant adopts the assignments of error filed with the United States District Court for the Western District of Washington, in this cause on June 2, 1945, as the statement of points upon which appellant intends to rely on appeal.

II.

Appellant designates each and every item of the certified apostles on appeal except that portion of the transcript of proceedings in Court which will hereafter be designated by appellee, including all exhibits admitted in evidence at the trial, as necessary for the consideration of said appeal and of the points to be relied on by appellant on said appeal.

J. CHARLES DENNIS,  
United States District  
Attorney

By BOGLE, BOGLE & GATES  
STANLEY B. LONG  
EDW. S. FRANKLIN  
Proctors for Appellant

[Endorsed]: Filed July 23, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

MOTION FOR ORDER DISPENSING WITH  
REPRODUCTION OR PRINTING OF EX-  
HIBITS.

Comes now the appellant, and moves the Court for an order dispensing with the reproduction or printing of the following exhibits admitted in evidence by the trial Court to-wit:—Libellant's Exhibit 3, Respondent's Exhibit A-3, Respondent's Exhibit A-6, Respondent's Exhibit A-7, Respondent's Exhibit A-8, Respondent's Exhibit A-9, Respondent's Exhibit A-10, Respondent's Exhibit A-11, Respondent's Exhibit A-12, Respondent's Exhibit A-14.

This motion is based upon the records and files herein and upon the affidavit of Edw. S. Franklin, one of the proctors for appellant, hereto attached.

J. CHARLES DENNIS,

United States District

Attorney

By BOGLE, BOGLE & GATES

STANLEY B. LONG

EDW. S. FRANKLIN

Proctors for Appellant.

So Ordered:

FRANCIS A. GARRECHT,

Senior United States Circuit

Judge

State of Washington  
County of King—ss.

Edward S. Franklin, being first duly sworn on oath deposes and says: That he is one of the proctors for appellant in the above entitled action; that he is familiar with all of the exhibits introduced in evidence at the trial of the above-named action; that many of said exhibits are not of a printable type and many of them cannot be reproduced or printed are reproduced in the transcript of proceedings; that the material portions of Libellant's Exhibit 3 have been read into the transcript of evidence and their reproduction would be duplicious; that Respondent's Exhibit A-3 is a photostatic copy of the General Agency agreement; the material portions thereof being read in evidence; that Respondent's Exhibits A-6, A-7 and A-8 are photographs; that Respondent's Exhibits A-9 and A-10 are charts and diagrams; that Respondent's Exhibit A-11 is a copy of the shipping articles, the material portions of which were read in evidence; Respondent's Exhibit A-12 is a voluminous record of the original hospital record of Libellant containing charts, diagrams, etc.; that Respondent's Exhibit A-14, is the testimony by deposition of Dr. James C. Schumacher, already read into evidence

during the trial and appearing in the transcript of record.

EDW. S. FRANKLIN

Subscribed and Sworn to before me this 18th day of July, 1945.

(Seal)                      ARTHUR G. GRUNKE

Notary Public in and for the State of Washington,  
residing at Seattle.

The appellee above named consents that the foregoing motion be granted and that these exhibits be considered in their original form, not reproduced or printed.

SAM L. LEVINSON

Proctor for Appellee

[Endorsed]: Filed July 23, 1945. Paul P. O'Brien, Clerk.

---

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNA-  
TION OF THE RECORD UPON WHICH  
CROSS-APPELLANT INTENDS TO RELY  
ON HIS CROSS-APPEAL

(1) That the libelant was an employee of the respondent Alaska Steamship Company under the facts and circumstances of his employment on the SS George Flavel, and under the rights and obligations assumed by the respondent Alaska Steamship Company under the General Agency Agreement, and the allocation of the SS George Flavel

to the respondent Alaska Steamship Company, the respondent Alaska Steamship Company was jointly liable with the respondent United States of America and was improperly dismissed.

(2) That the cross-appellant hereby designates the following portions of the record upon which he will rely:

Exhibit A-3, Exhibit A-4, and Exhibit A-5;

Transcript of Testimony: Lubinski, page 21. Killingsworth, page 213, line 1, to page 226, line 24. Kenney, page 290, line 21, to page 294, line 16, and page 306, line 23, to page 311, line 18. Tomlinson, page 394, line 25, to page 402, line 7.

SAM L. LEVINSON

Proctor for Libelant-Appellee.

Copy Received Jul. 18, 1945.

BOGLE, BOGLE & GATES

[Endorsed]: Filed July 23, 1945. Paul P. O'Brien, Clerk.

